IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

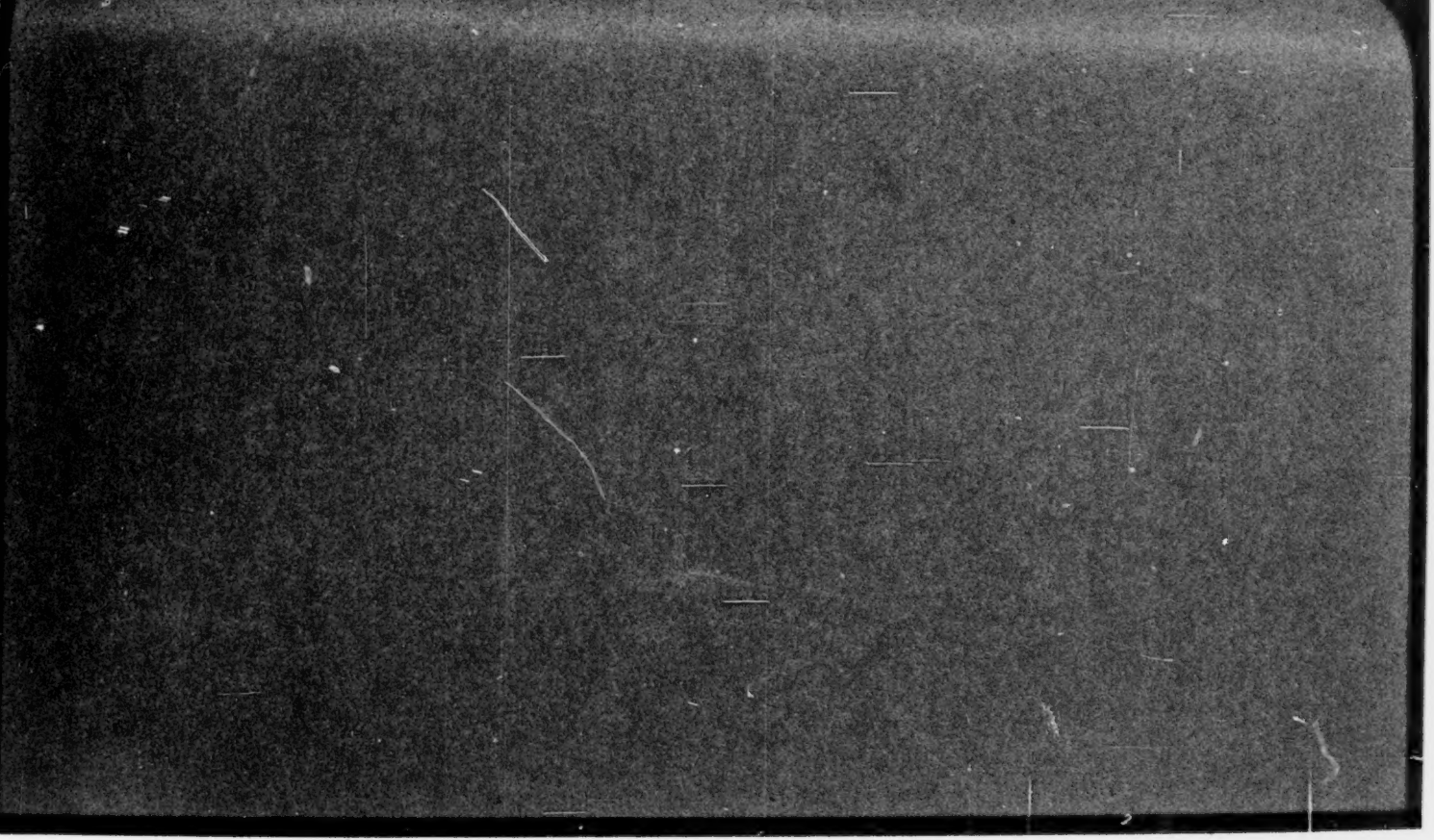
THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY AND SUPPLEMENTAL BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

BENJ. E. PIERCE,
JOHN L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Defendants in Error.

JANUARY 18, 1916.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY AND SUPPLEMENTAL BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

I.

Final Settlement.

U. S. *vs.* Ill. Surety Co., 195 Fed., 307, arose under a contract in the Navy Department. The work had been completed and a settlement and adjustment had been reached, but there was a provision in the contract by which the Government retained five per cent for one year to require the

contractor to keep the work in repair, and the district judge held that the fact that this amount was retained by the Government did not prevent a subcontractor or materialman from bringing suit under this statute before the one year of retention had expired, provided such suit was brought six months after the complete performance and the adjustment and settlement of the balance of the contract.

This case was subsequently carried to the Circuit Court of Appeals, and this position of the district judge was fully approved and affirmed, both on the original hearing and on the rehearing (226 Fed., 661-2), the court using this language:

> "We agree with the views expressed by the trial judge on both points, 195 Fed., 306. The statutory phrase 'settlement thereof' does not mean 'payment therefor.' When a final accounting was had between Schott and the Government, the contract was finally settled, even though payment of part of the balance found due on the accounting was to be withheld for a year as security for a guaranty of the work and the covenant to keep it in repair during that period."

In U. S. *vs.* Mass. Bonding Co., 215 Fed., 244, cited by counsel for plaintiff in error at page 14 of his argument, Circuit Judge Dodge, in discussing the meaning of final settlement in connection with the case of U. S. *vs.* Ill. Surety Co., 195 Fed., 306, says:

> "There are no such stipulations in the contract here under consideration, and unless 'final settlement' can be taken in the sense for which this subcontractor contends, it is not shown that the statutory condition precedent was satisfied when the suit was brought. There is difficulty in holding that there can be no 'final settlement' of such a contract as this before full payment of everything due under it has been made. If such full payment was intended to be the beginning of the six-month period, it is difficult to see why a term whose meaning is open to so much question as the term 'final settlement,' should have been used to express it. But even if it be conceded that final de-

termination of what was due for the completed work would be 'final settlement' intended by the statute, I am unable to regard the agreed facts as sufficient to show that the quartermaster's report in March was 'final settlement' in that sense. The Treasury Department, it would seem, had still to pass upon that report, and its decision was not made until January, 1913, and a suit brought before it was made would still be premature.

"It is true that either 'final settlement,' in the above sense, or final payment, might be delayed for a year or more after completion of the work, and that in a suit brought six months thereafter no creditor could intervene, according to the strict language of the statute, which allows such intervention within a year from the completion of the contract work and not later. But even in view of this difficulty in ascertaining the true meaning of the statute, I am unable to hold that these agreed facts establish a 'final settlement' six months prior to November 7, 1912. I must therefore find for the defendant and dismiss the suit."

II.

Amendment.

The case of Lilly *vs.* Railroad Co., 32 S. C., 142, cited by counsel for plaintiff in error at page 28 of his brief, holds that where an action was commenced by the widow of an intestate as administratrix for the recovery of damages for the death of her husband, and alleged "that said plaintiff and —— children of tender years were solely dependant for support and subsistence upon him, and by reason of his death, *i. e.*, of the death of the said Green Lilly, is left utterly helpless and destitute, and was damaged in the sum of $10,000.00," could not be amended by adding a paragraph setting forth "That said plaintiff was the widow of said Green Lilly, deceased, and she brings this action for the benefit of herself and her several children by said Green Lilly," the court holding that the complaint did not state a cause of

action at all, and that there was nothing to amend. And as under the statute the action could only be maintained by the widow in her own right for herself and children the action was gone.

The case of Coker *vs.* Monaghan Mills, also cited at the same page, was a decision by District Judge Brawley, based upon the Lilly case. The Lilly case, while based upon a State statute which is very much more circumscribed in its provisions than section 954 of the Revised Statutes of the United States, certainly cannot have any bearing in this court on the construction of that statute. The decision is in direct conflict with the decisions on section 954, in the case of Vandoren *vs.* Ry., 93 Fed., 271; 35 C. C. A., 293, and McDonald *vs.* State of Neb., 101 Fed., 171; 41 C. C. A., 287-8, and with the decision of this court in M., K. & T. R. Co. *vs.* Wulf, 226 U. S., 576; 57 L. Ed., 363, and the authorities cited above from this court and the Circuit Court of Appeals, at pages 14-18 of our brief.

IV.

Action at Law or in Equity.

The stipulation or letter of request made by the attorneys for all parties in this action, at pages 7-8 of the record, had more especial reference to the practice in the State court, under which three court calendars are provided and kept, No. 1 being ordinarily for the trial of issues of fact before a jury in law cases. The statutory provisions of the State of South Carolina are contained in sections 310, 312, and 314 of the Code of Civil Procedure of 1912, being volume 2, part 1. The portion of section 314 material to this point is:

> "There shall be three calendars for the court of common pleas, and the clerk shall arrange the causes thereon as follows: Upon calendar 1 shall be placed all cases and issues to be passed upon by a jury. Upon

calendar 2 shall be placed all cases to be passed upon by the court, including all motions and rules to show cause."

Section 312 is:

"*Issues—How Tried.*—An issue of law must be tried by the court, as also cases in chancery, unless they be referred as provided in chapter V of this title. An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived, as provided in section 326, or a reference be ordered."

The rules of the circuit and district court which were adopted and promulgated by Circuit Judge Simonton and District Judge Brawley, dated April 10, 1896, and taking effect July 6, 1896, and in force at the time of this hearing, applicable to this question, are:

"*Rule XX.*

"The clerk shall make three dockets. One docket shall contain all cases at issue. The other docket shall contain all motions to be tried by the court. Docket number three shall contain all cases wherein orders for judgment by default have been entered at the Rule Day, but final judgment cannot be had except by an application to the court in term."

Under rule 27 of the rules adopted by District Judge Smith, in force on and after January 1, 1914, he has slightly changed the names of the calendars or dockets, and speaks of the default docket as the first one, and jury issue docket as the second one. But this rule was not promulgated at the time (April 5, 1913) this letter of request was written, and the attorneys for all parties had in mind the old rule and State practice.

Question Raised Too Late.—In addition to the authorities which we have cited already (page 23 of our brief), we call

the court's attention to the decision of the Circuit Court of Appeals in U. S. *vs.* Ill. Surety Company, 226 Fed., 663-4, where the same question was raised by the same party who now raises it. After the argument had been filed in the Circuit Court of Appeals, but before the case was decided, the Judicial Code was amended by the act of March 3, 1915, adding section 274*a*, which provides:

> "SEC. 274*a*. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

While the court calls attention to this provision of the Code in declining to listen to this technical objection, it adds:

> "But even without the new statute the objection could not prevail for inasmuch as the court of law clearly was not without jurisdiction of the subject-matter, it comes too late. U. P. R. R. Co. *vs.* Whitney, 198 Fed., 784, 787; 177 C. C. A., 392; Reynes *vs.* Dumont, 130 U. S., 354; 9 Sup. Ct., 486; 32 L. Ed., 934. Again, as the case was, in effect, tried by the court without a jury, and its findings of fact are not attacked, it is of no practical importance whether a court of law or of equity was the proper forum."

In the case of Union Pac. Ry. Co. *vs.* Harris, 63 Fed., 800; 12 C. C. A., 598, the court said:

> "The objection that an action should have been brought at law instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time

> in the court of original jurisdiction. * * * If a party, when sued at law, conceives that the action or any material issue in it, is of equitable cognizance *he must interpose the objection at the threshold of the case.*"

This case was afterwards affirmed by this court in 158 U. S., 326; 39 L. Ed., 1003, without noticing the question as to the mode of trial, though it appeared on the face of the record.

The case of U. S. *vs.* Mass. Bonding Co., 215 Fed., 243-4, cited by counsel for plaintiff in error, was an action at law. U. S. *vs.* Emery, 225 Fed., 291-2, was an action at law.

Respectfully submitted.

BENJ. E. PIERCE,
JOHN L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Defendants in Error.

JANUARY 13, 1916.

Service of foregoing brief acknowledged.

Attorney for Plaintiff in Error.

JANUARY 13, 1916.

[Endorsed:] Supreme Court of United States. October term, 1915. No. 176. Ill. Surety Co., plaintiff in error, *vs.* The United States to the Use of J. A. Peeler, etc., *et al.*, defendants in error. Brief of counsel for defendants in error in reply. (24,268.) D. W. Robinson, Att'y.

6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, *et al.*, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

BYNUM E. HINTON,
Attorney for Illinois Surety Co.,
Plaintiff in Error.

INDEX.

Index to Cases Cited.

STATUTES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, *et al.*, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case is here upon writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, to review a judgment which affirmed a judgment of the District Court for the Eastern District of South Carolina against the plaintiff in error, the Illinois Surety Company, and in favor of the defendants in error, in an action founded on the act of Congress of August 13, 1894 (28 Stat. L., 278, ch. 280), as amended February 24, 1905 (33 Stat. L., 811, ch. 778).

This statute reads as follows:

> "*Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials; remedies on bonds, and proceedings in actions thereon.*
>
> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata*, among said interveners. If no suit should be brought by the United States *within six months from the completion and final settlement of said contract*, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be,

and are, hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, that where *suit* is instituted by any of such creditors on the bond of the contractor, *it shall not be commenced until after the complete performance of said contract and final settlement thereof*, and shall be commenced within one year after *the performance and final settlement of said contract*, and not later; *and provided further*, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing, the surety will be relieved from further liability: *Provided further*, that in all suits instituted under the provisions of this act, such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper of general circulation published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor." (Italics ours.)

The action was at law, and was commenced March 6, 1913 (Record, p. 48), when a complaint was filed by the

use plaintiffs, J. A. Peeler, and others, trading as Faith Granite Company, and Electrical Engineering and Contracting Company, assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company, against Ambrose B. Stannard and the Illinois Surety Company, plaintiff in error herein. Notice to other creditors was published, as provided in the act, and thereafter E. J. Erbelding and Holley & Dyches intervened in the action.

The use plaintiffs and interveners alleged that defendant Stannard had on the 5th day of July, 1910, entered into a contract with the United States for the construction of a post-office building at Aiken, South Carolina, for the agreed compensation of $45,618, and had given to the United States the usual penal bond, with the Illinois Surety Company as surety, in the penal sum of $23,000, conditioned, among other things, "that said Stannard shall promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract;" that said use plaintiffs and interveners had furnished labor and materials to Stannard for use in the prosecution of the work, for which they had not been fully paid, and demanded judgment for this balance to recover the same from said Stannard and the Illinois Surety Company. The original complaint alleged that the affidavit required by the statute had been made and that certified copies of the original contract and bond had been procured from the Secretary of the Treasury, but contained no allegation as to when, however, said work had been completed or final settlement therefor made.

Each of the defendants appeared on the 4th day of April, 1913, and filed separate answers to the original complaint and petitions of intervention, containing general denial of the facts alleged in said complaint and petitions of intervention; and thereafter served and filed notices of motion, in the nature of a demurrer, to dismiss the original complaint with petitions of intervention, on the ground that they do

not exhibit to the court a then existing cause of action, in that they did not show that the work had been completed and final settlement made more than six months and within one year prior to the time of the commencement of the suit; and upon the further ground that the right of action given by the act of Congress is equitable in its nature and cannot be inquired into or determined at law (Record, p. 12).

The motion to dismiss was heard on October 3, 1913 (more than one year after the completion and final settlement of the contract), and the court held in effect that the complaint and petitions of intervention did not show an existing cause of action, but allowed the same to be amended so as to include these necessary allegations. The court also held that the action was properly brought as an action at law. The motion was accordingly overruled. The opinion of the court is found on pages 13 to 16 of the record. The defendants duly noted an exception to the court's ruling and stated fully the grounds of their exception (Record, pages 16 and 17).

Amended complaints and petitions of intervention were thereupon filed and separate answers were made thereto by the defendants, upon which issue was joined, and the case was tried by the court without a jury, trial by jury being waived by consent of the parties (Record, p. 30).

The defendant Stannard pleaded discharge in bankruptcy, which plea was allowed (Record, p. 30).

The Facts as Shown at the Trial and as Found by the Court.

The record shows (Record, pp. 38-39) that the Supervising Architect on August 21, 1912, reported to the Secretary of the Treasury that the building had been practically completed June 3, 1912; that the chief of the technical division of his office had on August 15 certified that all work embraced by the contract had been satisfactorily completed and that all necessary proposals for additions, deductions, etc., had been received and had appropriate action, and recom-

mended certain deductions for damages for delay and requested authority to issue and pay a voucher in favor of the contractor for the outstanding balance under the contract of $3,999.01. On August 23, 1912 (Record, pp. 39-40), a letter was addressed to the custodian of the post-office at Aiken, South Carolina, furnishing him a statement of the account and directing him to prepare a voucher and forward it to the contractor for signature and reference to the Department for payment. On the same day a letter was addressed to the contractor informing him of the action taken, showing the deductions made and the balance found due. Voucher was prepared by the custodian bearing date August 26, 1912, and presumably forwarded to Mr. Stannard for signature and reference to the Department. He certified that the bill was correct and just. It appears on the face of the voucher (Record, p. 42) that it was received back in the office of the Supervising Architect August 29, 1912. The voucher was then approved, "By order of the Secretary: J. W. Parsons, Chief, Division of Accounts" (Record, p. 43). The date of this approval does not appear. It appears, however (Record, p. 43), that the voucher was then forwarded to the disbursing clerk, where it was received September 10, 1912, and was paid by check No. 10,878, dated September 11, 1912, and cashed by Stannard, September 12, 1912 (Record, pp. 41-43).

The court made the following finding on these facts:

> "The building was constructed and completed, and on the 21st day of August, 1912, the Treasury Department on behalf of the United States stated and determined the final balance to be paid A. B. Stannard in full settlement of the amount to be paid him under the contract at the sum of $3,999.01. The adjustment and determination of the Department to this effect was communicated to Stannard, who, on August 24th acknowledged receipt of the notification, and that a voucher would be issued to him in the amount of $3,999.01 in full settlement. On August 26th a voucher of that date was prepared by the Depart

ment showing the balance due Stannard to be $3,999.01, to which voucher Stannard appended his signature certifying that the bill for that amount was correct. There is no separate date placed to his signature, but the date of the voucher is August 26, 1912. The signature is presumably at the same date, and I find as a conclusion of fact that on August 26, 1912, Ambrose B. Stannard accepted the adjustment made and proposed by the Government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the Government for his work under the contract before mentioned. On the 11th of September thereafter a cheque for the sum of $3,999.01 was made out by the disbursing clerk of the Treasury Department payable to the order of Ambrose B. Stannard, who thereafter collected it."

The court thereupon found that there was $3,046.29 due the Faith Granite Company, $2,352.60 due E. J. Erbelding, and $500.71 due Holley & Dyches; and then as to the claim of $498.69, asserted by the Electrical Engineering and Contracting Company, assignee of the Carolina Electrical Company, found as follows:

"I find that the order proven in the cause as the authority for the receiver of the Carolina Electric Company to assign their claim to the Electric Engineering and Contracting Company is not sufficient authority for it. As, however, the statute permits any intervener to come in without any precise regulation of form other than a creditor may file his claim and be made a party hereto, I hold that the proceeding in this case is a sufficient filing of the claim on behalf of the Carolina Electric Company, and that such company is entitled to recover the amount above stated, judgment when awarded to be in the name or for the benefit of the Carolina Electric Company, and to be paid only to such person as may be authorized by law to receive it for them."

Judgment was accordingly entered for the benefit of the Carolina Electric Co. and the other three claimants in the respective amounts so found due.

Writ of error was thereupon sued out to the Circu
of Appeals and the judgment of the lower court was
in its entirety. The Court of Appeals, however, did
cide the question of whether the action authorized
statute is one at law or in equity, holding that this
no practical importance, as both parties had waiv
by jury and requested the court itself to try the case (
p. 70).

The opinion of the Court of Appeals is found o
65 to 70, inclusive, of the record.

Writ of error was thereupon issued out, bringing
to this court.

Points and Authorities.

The assignment of errors (Record, p. 72-3), pres
following questions for this court's decision:

I. Is the action given by the statute an action a
in equity, and if in equity, was it reversible error
trial court to proceed in and try it as an action
(Assignment 10.)

II. Was the action brought before the expiratio
months from "complete performance of the cont
final settlement thereof" within the meaning of the
(Assignments 1, 2, 3, 4, and 5.)

III. Was the court authorized to render judgm
the benefit of the Carolina Electrical Company, altho
company was neither a party to nor had intervene
action? (Assignment 8.)

IV. Did the amendment of the pleadings after
piration of one year from completion and final s
of the contract relate back to the commencemen
action? (Assignments 6, 7, and 9.)

These points will be taken up in the order named,

I.

Right of Action in Equity and Not at Law.

(Assignment 10, Record, Page 73.)

In United States *vs.* Wells, 203 Federal, 146, District Judge Sanford, Eastern District of Tennessee, had the following to say on this question (p. 147-8):

> "There is, in my opinion, strong ground for holding that the provisions of this act that *only one suit shall be instituted by a creditor or creditors, and for notice to other creditors of their right to intervene*, and the further provision that if the recovery on the bond is inadequate to pay the amounts due all creditors, *judgment shall be given to each creditor pro rata of the amount of the recovery, has the effect of making the amount due on the bond a trust fund which can only be properly administered in equity* and distributed among creditors in equitable proceedings; and that, in the language of Chief Justice Waite, in Pollard *vs.* Bailey, 20 Wall., 520, 525 (22 L. Ed., 376), the provision 'for proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it.' see also, Terry *vs.* Tubman, 92 U. S., 156, 161 (23 L. Ed., 537); Horner *vs.* Henning, 93 U. S., 228 (23 L. Ed., 879); Handley *vs.* Stutz, 137 U. S., 366 (34 L. Ed., 706); Bailey *vs.* Tillinghast (C. C. A., 6), 99 Fed., 801, 805; 40 C. C. A., 93; Alsop *vs.* Conway (C. C. A., 6), 188 Fed., 568; 110 C. C. A., 366; Merchants' Bank *vs.* Stevenson, 10 Gray (Mass.), 232. This view is emphasized by the fact that there is *no right of intervention in a case at common law*, and that a *court of law has no adequate machinery for the entertainment and distribution of funds among the various beneficiaries thereto.*" (Italics ours.)

In United States to the use of Miller *vs.* Mitchell, 212 Fed., 136 (C. C. A., 2d Cir.), Judges Lacombe, Coxe, and Ward,

speaking through Judge Ward, held, after quoting th
amendment of February 24, 1905 (p. 139):

> "*We see in this amendment an intent on the pa*
> *of Congress to substitute for a number of indepen*
> *ent actions at law*, in which vigilant had a priori
> over non-vigilant creditors, *a suit in which*
> creditors shall be given notice and an opportunity
> intervene and share ratably in a fund intended f
> the equal protection of all. *This provision whi*
> *is not adapted to nor indeed available in actions*
> *law, distinctly marks the proceeding as equitab*
> We are not convinced by the able presentation of t
> contrary view in U. S. *vs.* Stannard (D. C.) 2
> Fed. 198, which is the only case in which the questi
> has been raised down to the present time." (Ital
> ours.)

In United States *vs.* Scheurman, 218 Fed., 915, Distr
Judge Dietrich, District of Idaho, said (p. 919-20):

> While the question is not free from uncertain
> *I am inclined to the view that the action is upon*
> *equity side of the court. In some contingencies*
> *least there are adjustments to be made which*
> *difficult to accomplish by the verdict of a jury.*
> was doubtless the purpose of Congress to substit
> the undertaking for the right of lien which in n
> jurisdictions is conferred upon laborers and mate
> men, in the case of private structures, and the
> forcement of claimants' rights in the undertaking
> a case like this is not without analogy to the enfo
> ment and marshalling of mechanics' liens, and
> distribution of the proceeds in case a sale of the pr
> erty to which the liens attach is necessary. Under
> statute the surety may pay into court the full amo
> of the penalty of the bond and thereupon be relie
> from further liability, and *in such case the proc*
> *ing very clearly takes on an equitable aspect;*
> *only function being to equitably distribute a gi*
> *fund to numerous claimants in proportion to t*
> *several rights.*" (Italics ours.)

In U. S. *ex rel.* Hill *vs.* American Surety Company, 200 U. S., 197, construing the present act, this court said:

> *"A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter."* (Italics ours.)

It thus appears that, in the opinion of the eminent Federal judges above quoted, the action of Congress as amended February 24, 1905, created a right of action in equity and not at law. The only decision to the contrary is District Court decision in U. S. *vs.* Stannard, 207 Fed., 202-3. When the abundant and convincing reasons in favor of construing the statute as creating an action in equity are compared with the meagre reasons given in the Stannard case to the contrary, the argument, we submit, is all one way and in favor of equity.

In fact the Circuit Court of Appeals in the instant case did not question the contention of the plaintiff in error that the statute contemplated an equity action, but dismissed the proposition on the ground that it was of no practical importance, as trial by jury was waived. This is tantamount to holding that it is of no practical importance whether or not the provisions of the statute as to procedure are followed; that it is entirely a matter of expediency; that, although the statute which created the right of action provided that it must be in equity, the court may proceed to try it at law, if in the court's opinion the matter may be disposed of equally as well in that court. We do not believe such a doctrine will be approved by this court. It is not a question of whether or not a particular case under the act may possibly be completed without encountering equitable defenses. In other words, it is not a question of a particular case, but whether or not the right of action given by the statute is in equity; whether Congress has in the act itself restricted the right to equity. If so, the provisions of the act must be complied with, in this respect as well as others.

Whether or not questions in a particular case may arise cognizable only in equity cannot be always known when the action is instituted. Obviously, suits cannot be prosecuted under this act promiscuously, in law or in equity, and be transferred from law to equity or *vice versa*, as developments may require. Nothing could more tend to confuse and obliterate the distinction between law and equity which has been so carefully preserved in the Federal courts.

It is the settled law of the Federal courts that an action which is inherently equitable in its character cannot be adjudicated in a court of law, even by consent of the parties.

> Thompson *vs.* R. R. Companies, 6 Wall., 134.
> Lindsay *vs.* First National Bank, 156 U. S., 485.
> Levi *vs.* Mathews, 145 Fed., 152.

Lindsay *vs.* First National Bank, *supra* (p. 489), was an action at law, and an "exception," equivalent to a demurrer, raised the objection in the lower court that the action was equitable. The exception was overruled and the case proceeded to trial and judgment. When the case reached this court, this court held:

> "The case is thus brought within the rule, which this court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles, and that although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. Cases cited.
>
> "It is true that the cases in which such strictures have been expressed have been usually those in which

> resort has been had to equitable forms of relief, instead of legal remedies, and when defendants have thus been deprived of the constitutional right of trial by jury; but, so long as we attach importance to regular forms of procedure, we cannot sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury and the law prescribed by the judge for the usual and legitimate practice of a court of chancery."

This decision is still the law of the land and has been cited with approval in innumerable Federal decisions.

In Levi *vs.* Mathews, *supra* (C. C. A.), before Goff and Pritchard, circuit judges, and Purnell, district judge, Judge Purnell, speaking for the court, said (145 Fed., 154):

> "The distinction between legal and equitable defences, whatever may be the rule in other jurisdictions, in the courts of the United States, are always recognized and jealously guarded. They cannot be mixed. *Equitable suits must be on the equity side of the docket, and actions at law on the law side. No principle is better settled in these courts.* Burnes *vs.* Scott, 117 U. S., 582; 6 Sup. Ct. 865; 29 L. Ed., 991. ***Nor can this distinction or jurisdiction be waived by consent of parties, but can and should be enforced by the court of its own motion. It is statutory.*** Thompson *vs.* R. R., 73 U. S., 134; 18 L. Ed., 765; Lewis *vs.* Cocks, 90 U. S., 466; 23 L. Ed., 70; Oelrichs *vs.* Spain, 82 U. S., 211; 21 L. Ed., 43; Lindsay *vs.* Bank, 156 U. S., 485; 15 Sup. Ct., 472; 39 L. Ed., 505. The claim of defendant below, plaintiff in error here, therefore, that the filing of the replication traversing the allegations of the complaint gave the court jurisdiction and made it the duty of the trial judge to submit the issues thus raised and tendered is without force. *Consent cannot confer jurisdiction.* The court of law was without jurisdiction of an equitable defense, and nothing the parties could do could endow it with jurisdiction. This is fundamental as to the United States courts." (Italics ours.)

II.

This Action was Prematurely Brought.

(Assignments 1, 2, 3, 4, and 5, Record, p. 72-3.)

The action was commenced on *March 6, 1913*. Whether or not this was premature depends upon whether "complete performance of said contract and final settlement thereof," within the meaning of the act, had taken place before SEPTEMBER 6, 1912. The issue depends upon the meaning of the words "complete performance" and "final settlement," as used in the act. There was no question about the facts. The material facts, as shown by the record (pages 38 to 43, inclusive), and found by the court (Record, p. 47), are:

> "August 21, 1912, Supervising Architect reported to Secretary that the building was completed, and asked for authority for the issue and payment of voucher of balance due the contractor, which report was approved and authority given that same day.
>
> "August 26, contractor agreed that amount shown on voucher was correct and just.
>
> "September 10, voucher received by disbursing clerk.
>
> "September 11, check issued in payment.
>
> "September 12, check cashed by contractor."

The question thus presented is whether or not there was complete performance and final settlement of this contract within the meaning of the law, before September 11, when check was issued by the disbursing clerk making final payment.

There have been a number of decisions by the Federal courts dealing with this question, on contracts arising under the different Executive Departments.

U. S. *vs.* Stitzer, 182 Fed., 513 (Navy Department Contract).

U. S. *vs.* Mass. Bonding Co., 215 Fed., 241 (War Department Contract).

U. S. *vs.* Robinson, 214 Fed., 38 (Treasury Department Contract).

U. S. *vs.* Winkler, 162 Fed., 397 (War Department Contract).

U. S. *vs.* Bailey, 207 Fed., 783 (Interior Department Contract).

The act of February 24, 1905, *was passed, not for the benefit of subcontractors,* but *for the benefit of the Government.* This is pointed out, apparently for the first time, in the Robinson case, *supra.* Circuit Judge Lacombe there said:

> "The statute is awkwardly and inartificially expressed, but it seems to us it may be easily construed by applying the well recognized rule of ascertaining first what was the difficulty to remedy for which the statute was passed, and second, what was the method adopted to remedy such difficulty."

Then, after pointing out that the act was passed to prevent subcontractors and material men from depleting the security which the Government had provided to secure a proper execution of the contract, further said:

> "The more important part of the new act is found in the clauses which provide in substance that no material man shall take one dollar of the fund which the bond produces until every dollar due the United States under the contract shall be fully paid. Keeping these clauses in mind, it seems to us that a reasonable interpretation of the disputed phrase is to be readily found. In determining the time when material men may begin suit, it would not do to fix it at some day 'after complete performance' merely. Defective work and damages for delay and other matters give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to 'complete performance of the contract *and final settlement thereof.*'

> We take it that these italicized words refer to the time when the proper Government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the Government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way. Six months after that date, material men may begin suit. This construction protects the Government against the defect of the old act, viz: that its suit to recover might prove defective because the money is gone. We can see no reason why Congress should have provided that when the Government claim nothing from contractor or sureties, all others must wait still further until some claim of the contractor against the Government for having underpaid him reaches a conclusion. Such suit can in no way affect the funds provided by the bond, out of which the Government might have satisfied its claim, if it had any. In other words, we see no reason for holding that the final settlement must be mutual, in cases where the Government makes no claim against the contractor."

That the purpose of the act was as stated by Circuit Judge Lacombe, is shown by the following from the report (No. 2360, 58th Cong., 2d Sess.) of the Judiciary Committee of the House of Representatives on the bill, which was passed and became the act of February 24, 1905:

> "The bill proposes to amend the act of August 13, 1894, for the protection of persons furnishing materials and labor for the construction of public works in such manner as to secure to the United States priority in the satisfaction of its claim against the contractor for such works out of the penalty of the bond given by him, in case he should fail in the performance of his contract, and to provide for a distribution of the remainder of such penalty among the persons furnishing labor and materials to the contractor, ratably in proportion to the amount of their respective claims, in case such remainder is insufficient to satisfy the claim of all.

"The necessity for this amendment has been brought about by the decisions of the Federal courts that the law which gives the United States priority in the satisfaction of its claim against an insolvent (Rev. Stat., sec. 3466), has no application to the case of an insufficiency of the penalty of the contractor's bond to satisfy both the claim of the United States and the claims of subcontractors in the event of a default by the contractors. (United States *vs.* Heaton, 124 Fed. Rep., 699, since affirmed by Circuit Court of Appeals; American Surety Co. *vs.* Lawrenceville Cement Co. *et al.*, 110 Fed. Rep. (25), 913; 123 Fed. Rep., 288; 124 Fed. Rep., 699; 126 Fed. Rep., 811).

"The practical effect of these decisions will be to postpone the United States in every case till the claims of subcontractors are satisfied, or else to compel the United States to accept a ratable share in the distribution of the penalty of the bond when all the parties having claims upon the bond are convened in a court of equity at the suit of the surety. This results from the fact that the claims of subcontractors nearly always mature before that of the United States, who are not in a position to sue on the bond until the time limited for the performance of the contract has expired."

It is thus apparent that this *act was passed for the benefit of the Government* and not subcontractors. Congress was endeavoring to protect the Government against any possible depletion by subcontractors of security provided by the bond taken by the Government. The act also shows that the proviso used for this purpose was intentionally made emphatic. In the body of the act the expression "completion and final settlement" is used, but in the proviso it said "*complete* performance of the contract and final settlement thereof." It might be observed in this connection that a contract between the Government and a contractor is bilateral and cannot be completely performed until *both parties* have done each and everything required of them by the terms of the contract. In this view, could it be said that there was

complete performance of a contract when there yet remained something to be done by the Government, namely, final payment? However, it is clear that Congress intended by the further words "final settlement" to provide that the *period of limitation should not begin to run until there had been "final settlement" of the contract.*

Meaning of "Final Settlement."

Congress was here dealing with respect to final settlement of a Government contract. It must be presumed that Congress knew the methods of final settlement then prescribed by law, and legislated with respect thereto. A complete exposition of the Government's method of settling its accounts will be found in McKnight's case, 13 Court of Claims, 292. The court there said (p. 299):

> "The Revised Statutes (sec. 236) require that 'all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.'
>
> "The principal *officers to whom this great responsibility is committed by law are called 'accounting officers' consisting of six auditors* (Rev. Stat., sec. 276), each acting separately upon different classes of accounts, and * * * the two comptrollers (Rev. Stat., sec. 268), each also acting separately in like manner * * *." (Italics ours.)

The court then takes up and shows how accounts upon the respective departments are settled by these accounting officers, resulting eventually in a warrant being issued in payment by the Treasurer of the United States, and says:

> "Then and not till then is the settlement consummated and payment authorized (Rev. Stat., sec. 3593, 3644)."

The court, after stating, "The first auditor receives and examines all accounts accruing in the Treasury Department," and after describing the method of settling accounts in this Department, further says:

> "Such is the method of the final settlement of all accounts in the Treasury, omitting much detail which occurs in carrying on the general course of business.
>
> "But vast sums of money are paid to parties for salaries and on other accounts by *disbursing officers* before the claims have passed the Treasury accounting, and the number of such officers is large, their appointments being provided for by special or general provisions of statute (Rev. Stat., sec 56-58, 62, *176*, 255, 496, 1153, 1382, 1550, 1563, 1765, 1951, 3144, 3646, 3648, 3658, 3677, 4839, etc.). *They are all under bonds, and responsible for the legality and correctness of their payments.* Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightly paid. All others are rejected, *and the disbursing officer and his bondsmen are held liable for any balances found against him on such settlement* (Rev. Stat., secs. 3622-3625; McKee *vs.* United States, 12 C. Cls. R., 553). (Italics ours.)
>
> "* * * These different processes in the settlement of claims and demands upon the Government from their receipt by the auditor, through the several stages of examination, certification, and drawing of warrants for payment up to the time when the Treasurer issues his drafts, are all matters of accounting, to justify the Treasurer in paying out the public money, and *are not consummated beyond recall until the claimants receive the negotiable drafts of that officer*, drawn according to the convenience of parties upon the Treasury proper in Washington, or upon one of the several assistant treasurers or designated depositaries in some other place.
>
> "*Such drafts are understood to constitute new con-*

tracts on the part of the Government, into which the previous claims upon which they issue are merged, and are valid and binding upon the United States in the hands of *bona fide* holders, by endorsement, for valuable consideration, as commercial bills of exchange and promissory notes are between individuals, whatever valid objections or defenses there may have been to the original claims and accounts upon which the settlements were made and drafts issued (Rev. Stat., sec. 308; The Floyd Acceptances, 7 Wall., 666).

"*The certificates and orders made previously to the issuing of the drafts are departmental proceedings, directions among the several public officers, none of which are delivered to the claimants,* or even allowed to be seen and examined by them, without leave from some officer having authority to grant it. Parties gain no new rights thereby, into which their former rights of action are merged, and upon which actions can and must be brought as upon an award." (Italics ours.)

R. S., sec. 191, provided that the settlement of accounts by the accounting officers "shall be conclusive upon the executive branch of the Government and be subject to revision only by Congress or the proper courts."

The McKnight case was decided in 1877. The accounting system of the Government was thereafter revised by act of Congress July 31, 1894, ch. 174; 28 Stat. L., 162; 7 Ann. Stat., 382-5. This act repealed R. S. 191, but substituted a similar provision (section 8) making the *accounting officers' certificates conclusive upon the executive branch of the Government.* The revision also substituted the office of comptroller and assistant comptroller for the offices of the two comptrollers provided for in the old law. The revision also effected certain changes in minor details of procedure in the settlement of accounts, but the general method of settling accounts remained substantially the same. The duties and responsibilities of the disbursing officers were not changed. (See R. S., 176, and section 8, above act of 1894).

The exclusive right of the accounting officers to make final settlement, and the point at which such settlement was finally consummated, was likewise not changed.

It will be observed, therefore, that at the time this act of Congress was passed February 24, 1905, the *Secretary of the Treasury had no authority whatever to make final settlement of a contract.* His action with regard to settlement had not a single element of finality.

It will be observed that vast sums of money are paid out by *disbursing officers* before the accounts have passed this Treasury accounting. It is common knowledge that the great bulk of the public money is paid out in this way. Practically all of the money paid out on Government contracts is paid out in this manner by disbursing officers, as was done in the instant case. *These disbursing officers are under bond and they and their bondsmen are personally responsible for the legality and correctness of their payments* (R. S., 176).

We respectfully submit that there was no final settlement in the case at bar prior to the issuing of check for final payment by the disbursing office on September 11. The amount found due by the Supervising Architect and approved by the Secretary and agreed to by the contractor was not final in any sense of the word. It was not binding on anybody except possibly the contractor. The Secretary of the Treasury had no authority whatever to agree upon any amount which would bind the Government. Neither would his action in the matter carry with it any financial responsibility or any security to the Government in case of error. If it should have been found in error before payment, it would have been adjusted and revised to suit the new findings. In other words, it was a tentative or proposed settlement merely.

The action by the disbursing officer, however, in issuing his check was an entirely different matter, and would seem to meet both the letter and spirit of the act. The common acceptation of the word "settle" is to pay. Also, this is the

first point in the proceedings where the act carries with it financial responsibility and security to the Government against error. He must examine the contract and the vouchers and make sure that the proposed payment is in accordance with the facts and the law of the contract. If he is not satisfied that it is, he can have it referred to the accounting officers for final settlement (R. S., 236), or to the comptroller for an advance opinion (sec. 8, act July 31, 1894-7, An. Stat., 384). If he is satisfied that the proposed payment is correct he makes payment, and the contract is for all practical purposes closed. It is a final settlement in that sense. It goes to the accounting officers thereafter for further review, but *only incidentally as a part of the disbursing officer's account.*

Furthermore, the Government holds back a reserved percentage on every contract as additional security for the completion of the work. *It is when the disbursing officer issues his final check that this reserved percentage or additional security is released.* This is another strong indication that the Government has finally concluded it will not need to go against the contractor's bond.

Also, this one act—the issuing of check by the disbursing officer—making final payment and releasing the reserved percentage—*is the one point in the proceedings that is common to all Government Departments and other branches of the Government.* Each of the Departments have more or less different methods of procedure leading up to this point. The Treasury Department has the method shown in this case. The method of the War Department is different (U. S. *vs.* Mass. Bonding Company, 215 Fed., 241). The method of the Navy Department appears to be different from either of these (Stitzer *vs.* U. S., 182 Fed., 513). The method of the Interior Department appears to be still different yet (U. S. *vs.* Bailey, 207 Fed., 783. From the latter case it appears that the administrative officer agrees with the contractor upon a proposed basis of settlement and the contractor gives

a release, whereupon the account is referred to the auditor for final settlement, *before payment*. The court in that case held that the settlement by the auditor (one of the accounting officers) was "final settlement."

It is our contention that there cannot be final settlement of a Government contract within the meaning of the act until either the issuance of a check by a disbursing officer (if payment is made before audit), or until the settlement of the account by the auditor (if the matter is referred to the accounting officers for settlement before payment). The reason for this position is that the settlement by the "accounting officers" is a final settlement in every sense of the word, because Congress has given those officers authority to make final settlement of its accounts. The issuance of a check by a disbursing officer may reasonably be construed to be final settlement within the meaning of the present act of Congress, because by that act the work is *settled for* in the ordinary acceptation of the term; and also by that act *the reserved percentage is released* and *the disbursing officer makes himself and his bondsmen responsible for the legality and correctness of the payment*, thereby substituting the security of his own bondsmen for the security provided to the Government by the bond of the contractor. This complies with the manifest purpose of the act, to have the six months' period of limitation begin to run from the time the Government has finally concluded that it will probably not have occasion to resort to the security provided in the contractor's bond.

The finding of the court in other cases and in this case that there was a final settlement when the proposed payment by the head of the Department was agreed to by the contractor entirely overlooks the fact that the head of the Department has no authority to make final settlement; that his action with respect to settlement carries with it no real responsibility; that this proposed payment still remained to be passed on by the disbursing officer, who would either accept the responsibility and make payment, or would submit it to the

comptroller for advance decision (sec. 8, act 1894, *supra*), or would have it referred to the accounting officers for final settlement and payment (R. S., 236). It is obvious that after the head of the Department and the contractor had agreed on the amount, final settlement might have been made promptly thereafter and yet might not have been made for six months or more, as shown in the case of United States *vs.* Mass. Bonding Company, *supra*, and might then have been made on an entirely different basis.

The contention made by the defendants in error that the finding of the trial court, as a conclusion of fact, that there was final settlement in this case more than six months before institution of suit is conclusive on this court, is without force. There was no question about the facts. The error was an error of law, in holding in effect that the Secretary of the Treasury had the authority to make a final settlement with the contractor. Furthermore, if our contention is right as to the meaning of final settlement as used in the act, there is no evidence to support the trial court's conclusion that there was such a settlement prior to September 11, 1912.

The defendants in error and the lower court cited the construction placed on the words "final settlement" by the Treasury Department, and contend that it is entitled to great weight, as the construction placed on a statute by a department charged with its execution. In the first place, neither the Treasury Department nor any other executive department is charged with the execution of this statute. The departments have nothing whatever to do with its execution. Its execution is entirely for the courts. In the second place the Treasury is only one of nine executive departments, all of which make contracts for public works. Congress was legislating with respect to all the departments, the entire Government service. In this connection we hope it is not improper to invite this court's attention to War Department Bulletin No. 7, dated March 11, 1914, on this statute, and in which is found the following language:

> "*Final settlement:* The Department treats as the date of final settlement mentioned in said acts the date on which the *final payment* under the contract is made." (Italics ours.)

If the statute is to receive a liberal construction, *so as to advance its purpose,* as contended for by the other side, "final settlement" will be construed to refer to the *last* rather than the *first* possible date, *so as to give the Government the full benefit of the protection for which the act was passed.*

We submit, however, that subcontractors as a class are not so much interested in whether final settlement is construed to refer to an early or a late step in the proceeding, as they are in having it fixed as some step common to all departments which can be easily and definitely determined. If this court should hold the alleged settlement letter of August 21 to be final settlement, the question would not be settled as to other departments, whose proceedings may have no step exactly corresponding to this. We believe it would also be unfortunate if the result of this court's decision should be to make it necessary to go into the Government files in each case and determine the *earliest period* at which the executive officers and the contractor agreed on the amount which happened to be finally paid. It would be very easy to determine, however, the date of the disbursing officer's final check, or the date of the auditor's final settlement, and as above shown, these steps are common to all Government departments.

III.

The Court Was Without Authority to Render Judgment for the Benefit of the Carolina Electrical Company.

(Assignment 8; Record, p. 73.)

The Carolina Electrical Company neither joined in the original complaint nor intervened in the action. The Electrical Engineering & Contracting Company joined as plain-

tiff in the original suit, as alleged assignee of the Carolina Electrical Company, but the trial court held that it failed to prove a valid assignment and was, therefore, without right to recover. There was, therefore, we submit, no plaintiff before the court in whose favor judgment could be given. Obviously judgment could not be given to the Carolina Electrical Company without first making it a party to the proceedings. It could not be made a party at the time judgment was rendered, November 10, 1913, because the statute of limitations had then run. Where an amendment *adds a new party, the action is not commenced as to such party until the filing of the amended complaint.* Henry Miller's Heirs *vs.* Jacob M'Intyre *et al.*, 6 Pet., 61. This case was cited with approval in Hewitt *vs.* Penn. Co., 24 Fed., 370, dismissing suit for infringement of patent where amendment including proper plaintiff was not filed before patent expired; Miller *vs.* Holt, 99 Ala., 209, holding where new defendants are brought in by amendment, statute runs up to date of filing same, and numerous other cases to same effect cited in Rose's notes on the case of Miller's Heirs *vs.* M'Intyre, *supra.*

There was at the time of judgment *no existing right of action in anybody* for this claim. The holding of the trial court that the proceeding in this case was a sufficient filing of the claim on behalf of the Carolina Electrical Company to entitle it to recover under the statue was obviously in error. The statute provides that—

> "any creditor may file his claim in such action and be made a party thereto *within one year from the completion* of the work under said contract and not later."

The Carolina Electrical Company did not file its claim. The claim in question was filed by another. The Carolina Electrical Company was not made a party to the suit. The Electrical Engineering and Contracting Company, alleged assignee, was made a party to this suit instead. We respectfully submit that the trial court was therefore without

authority to give judgment in the name of and for the benefit of the Carolina Electrical Company.

But the defendants in error contend that this was merely the case of a substituted party, and cite M., K. & P. R. Co. *vs.* Wulf, 226 U. S., 576, and McDonald *vs.* State of Nebraska, 101 Fed., 171. The Wulf case was a plain case of amendment, justified under the law with respect to amendments. The proper party had sued, but in her individual capacity instead of her capacity as personal representative. The court allowed the amendment to her representative capacity, for the reason that she "was the sole beneficiary of the action" in either case. That is not the case at bar. Here the *wrong party* has sued, and the court attempted to give judgment in the name of and for the benefit of the supposed right party.

Neither is this case like the McDonald case. In the McDonald case the State had a claim, and its treasurer sued on it, but in his own name. This was error. The action should have been in the name of the State, but the court allowed the substitution of the State as plaintiff. There the treasurer was obviously suing for the benefit of the State, as the agent or official representative of the State. The substitution went merely to the form, not to the substance. But in the present case the Electrical Engineering and Contracting Company was not suing for the benefit of the Carolina Electrical Company, but for its own benefit and in its own right. It is no different from any other case where the plaintiff fails to show his right to recover.

The case is rather analogous to First National Bank *vs.* Shoemaker, 117 Pa. St., 94: 2 Am. St. Rep., 649, where it was held that in an action by the payee of a non-accepted draft against a bank, it was error to allow an amendment of the record substituting the drawer as the legal plaintiff for the use of the payee, particularly when the drawer's right of action against the bank (as the Carolina Electrical Company's right of action under the bond here) had been

barred by the statute of limitations at the time of the amendment.

If the proceeding here followed was proper, we submit, there is no reason why a person could not speculate in this class of litigation; that is, a person having knowledge of a claim soon to be barred and knowing the owner thereof to be either absent or in ignorance of this fact, could institute suit on a pretext of an assignment, and after the statute had run could make terms with the owner, whose claim otherwise would have been barred, and who could then come in at the trial or afterwards, prove title and collect the judgment. We submit the action of the lower court on this claim was error and the judgment should be reversed.

IV.

The Amended Complaint and Petitions Did Not Relate Back to the Commencement of the Action.

(Assignments 6, 7, and 9; Record, p. 73.)

> "The power to amend must not be confounded with the power to create."
>
> Gagnon *vs.* U. S., 193 U. S., 451.

The test whether a complaint is or is not amendable is whether it omits some allegation essential to the existence of the cause of action, or does it allege substantially or inferentially all the elements necessary for the existence of the cause of action, but states them defectively, inaccurately, imperfectly or inartistically.

> Lilly *vs.* Railroad Company, 32 S. C., 142, followed in Coker *vs.* Monaghan Mills, 119 Fed., 706.

The time of completion and settlement of the contract being an essential element of the right of action created by the statute in question, its allegation in the complaint was

essential. It was not expressly alleged in the original complaint, nor could it be inferred from any other allegations therein, hence we submit that the district court erred in permitting the amendment. That a new cause of action cannot be introduced, *or a fatal and material defect corrected* after the statute of limitations has become a bar, has been so often recognized that no authorities need be cited.

As said in St. L. & S. F. R. Co. *vs.* Loughmiller, 193 Fed., 698:

> "What the petition of the plaintiff in this case before amendment failed to do was to present for the determination of the court in any manner or by any means a right of action conferred on him by the statute * * * which created a right of action in his favor and against the defendant * * *, and his petition before amendment having for this reason failed to assert and present a right based on the statute, the right was irrevocably lost by reason of his non-compliance with the condition on which the right was conferred by the statute."

The same rule was applied in Brinkmeier *vs.* Mo. Pac. R. R. Co., 224 U. S., 269

The case of Mo., Kan. & Tex. Ry. Co. *vs.* Wulf, 226 U. S., 570, relied upon by the district judge as authorizing this amendment, was distinguished from U. P. Ry. Co. *vs.* Wyler, 158 U. S., 285, and is distinguishable from the case at bar, in that there the amendment allowed "introduced no new or different cause of action, *nor did it set up any different state of facts as the ground of action*, and therefore it related back to the commencement of the suit." (See 226 U. S., 576.)

In the case at bar, the additional fact as to the time of the completion and settlement of the contract, not alleged in the original complaint and essential to the existence of the cause of action, is for the first time alleged in the amended complaint, authorized to be served and filed, in October, 1913, more than one year after the alleged date of the settlement (see amended complaint, par. 14, Record, p. 20), and

after the expiration of the period within which an action might be brought. This case is on all fours in this respect with Brinkmeier *vs.* Mo. Pac. Ry. Co., *supra.*

Respectfully submitted,

BYNUM E. HINTON,
Attorney for Illinois Surety Co.,
Plaintiff in Error.

19

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 176

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR

(24,268)

The R. L. Bryan Company, Printers, Columbia, S. C.

INDEX.

INDEX TO CASES CITED.

H.

I.

J.

K.

M.

N.

P.

R.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 176

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR

The questions presented in this case are:

I. WAS THE ACTION BROUGHT BEFORE THE EXPIRATION OF SIX MONTHS FROM THE COMPLETION AND FINAL SETTLEMENT OF THE CONTRACT?

II. WAS THE AMENDMENT OF THE PLEADINGS AFTER THE EXPIRATION OF ONE YEAR FROM THE COMPLETION AND FINAL SETTLEMENT OF THE CONTRACT AUTHORIZED?

III. WAS THE COURT AUTHORIZED TO RENDER JUDGMENT FOR THE CAROLINA ELECTRICAL COMPANY—A SUBSTITUTED PARTY?

IV. IS THIS AN ACTION AT LAW OR IN EQUITY?

STATEMENT.

This was an action commenced by the plaintiff on March 6, 1913, (Record, page 48), under the Act of Congress of August 13th, 1894, as amended by the Act of February 24, 1905, giving to subcontractors the right to sue upon the bond of a contractor. Notice for other creditors was published as provided in the Act, and under this notice E. J. Erbelding duly filed and served a petition of intervention on the plaintiff and on the defendants on April 26, 1913 (Record, page 8); and on June 27, 1913 (Record, page 9), Holly & Dyches filed and served their petition of intervention. The defendants appeared on the 4th day of April, 1913 (Record, page 7), and filed and served separate answers. And the defendants each also duly served separate answers (Record, page 11) to each of the petitions for intervention, denying the facts set forth in the petitions.

The decision of the Circuit Court of Appeals appears in the Record, pages 65-70, and is reported in 215 Fed., 334-40; 131 C. C. A., 476-82.

1. LIMITATIONS—COMPLETION OF CONTRACT—FINAL SETTLEMENT. On August 21, 1912 (Record, pp. 38-9), the Supervising Architect made report to the Secretary of the Treasury that the chief of the Technical Division of his office had certified that all work embraced in the contract had been completed, and that after certain deductions for delays, he recommended that there was due to the contractor and that authority be given for the payment to said contractor of $3,999.01. This report was approved the same day by the Assistant Secretary of the Treasury, and on August 23, 1912 (Record, pages 39-40), a statement was made and forwarded in a letter to the Custodian of the postoffice at Aiken, S. C., and a similar letter (Record, pp. 40-1) was sent by the same officer to the contractor, Mr. Stannard.

On the 26th day of August, 1912 (Record, pp. 41-2), a statement was made out in favor of Mr. Stannard for this amount, and he certified at the bottom of it **that it was correct** and that payment therefor had not been received.

On August 24, 1912 (Record, page 43), the contractor, Stannard, wrote a letter to the Supervising Architect of the Treasury, acknowledging a letter of August 20th (which we think was statement of August 21st), stating that the settlement was to be for **$3,999.01 "in full settlement,"** and there is no objection or

suggestion of dissent from this in the letter. This letter was received by the Supervising Architect on August 26, 1912.

And on August 31, 1912 (Record, page 44), the contractor, Stannard, wrote to one of the subcontractors advising "that final voucher has just reached me for postoffice building, Aiken, S. C., and I have signed and returned it to Washington for check." And the District Judge found that the final adjustment and settlement was had on August 26, 1912 (Record, page 49).

2. LIMITATIONS—AMENDMENT. Just after the defendants appeared and answered, on April 4, 1913, they entered into an agreement with the plaintiff on April 5th, 1913 (Record, page 7), "that the cause be placed on Calendar 1 for trial of issues of fact raised by said answer; and assigned to be called for trial at the next ensuing regular term of the United States District Court to be held in Columbia." **After the expiration of twelve months** from the completion and final settlement of the work, September 22, 1913, but shortly prior to the time set for the trial of the cause, the defendants gave notice of a motion to dismiss the complaint upon the ground that the complaint did not allege and show on its face that the completion and final settlement was more than six months prior to the commencement of the action and within one year before the commencement of the action; and the complaint did not allege any completion and final settlement between the contractor and the government; and that the action was one in equity and not at law (Record, p. 12).

The original complaint filed by the plaintiff did not allege the date of completion and final settlement, but did allege, paragraph 11 of the complaint (Record, page 6), "that on the 16th day of November, 1912, plaintiff made the affidavit required by the statute and procured from the Secretary of the Treasury certified copies of the original contract and bonds."

In the intervention petition filed by E. J. Ehrbelding, it is distinctly alleged, paragraph 2, "that the contract was completed on the 20th day of July, 1912, and final settlement authorized by the Treasury Department on August 21, 1912" (Record, p. 8).

Upon this motion to dismiss, the Judge, by his order of October 4, 1913, held that it was necessary to allege the date of final settlement and completion (Record, page 14), but that "these limiting conditions are no part of what may be said to be the fundamental right of action given by the statute." And that: "In the opinion of the Court, therefore, while the facts required by the statute as showing that a final completion and final settlement of the contract with the United States was had, and that the action has been

brought within the period prescribed by the statute, are not as clearly and amply stated as they should be, yet a cause of action is sufficiently pleaded in the complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect by way of amendment, under the rule upheld by the Supreme Court of the United States in the case of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S., p. 570" (Record, p. 15).

The Court, thereupon, permitted the plaintiffs and intervenors to amend the original complaint and the petitions of intervenors by showing the date of completion and final settlement, and also by showing that the United States had brought no action. The defendants duly excepted to this order, and, after the amendment, again raised an issue upon the trial as to whether the action was brought within the proper time.

3. SUBSTITUTED PARTY. The plaintiff, Electrical Engineering & Contracting Company, set up a claim, paragraphs 10 to 13 of the complaint (Record, pages 6-7), for conduit and wiring system furnished and installed by Carolina Electrical Company, and also set forth that this claim of the Carolina Electrical Company was now owned by the Electrical Engineering and Contracting Company. Testimony was offered as to the charter of the Carolina Electrical Company (Record, pages 31-38), and as to the incorporation of the Electrical Engineering and Contracting Company; and of amendment to the incorporation of Carolina Electrical Company.

Plaintiff also offered an order of the Superior Court of Wake county, State of North Carolina, in the case of certain creditors of Carolina Electrical Company, appointing a receiver, authorizing him to sue for any and all debts of the Carolina Electrical Company, and to take charge of and take into his possession all property of this company. This order is dated October 21, 1912 (Record, pages 45-6).

The District Judge found (Record, pages 50-1) that there was due to the Carolina Electrical Company the debt as set forth in the complaint, $498.69, but it had not been sufficiently proved that the receiver of the company had a right to assign it to the Electrical Engineering and Contracting Company, and that the claim was sufficiently filed, and that the Carolina Electrical Company was entitled to recover this sum, the judgment to be paid "only to such person as may be authorized by law to receive it for them."

STATUTE. So much of the statute, 28 Stat. at L., 278, Chap. 280; U. S. Comp. St., 1901, p. 2523; 33 Stat. at L., 811, Chap. 778;

U. S. Comp. St. Sup., 1909, p. 948, as is material to the points raised here is (italics ours):

> If no suit should be brought by the United States within *six months from the completion and final settlement of said contract*, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor, *it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later: And provided, further*, That where suit is so instituted by a creditor or by creditors, *only one action shall be brought, and any creditor may file his claim in such action*, and be made party thereto within one year from the completion of the work under the said contract, and not later.

ARGUMENT.

SPECIFICATION I.

ASSIGNMENTS OF ERROR 1-5.

LIMITATION—MEANING OF COMPLETION AND FINAL SETTLEMENT.

Under the plaintiff's assignments of errors, Nos. 1, 2, 3, 4, 5, the plaintiff raises the question as to what is meant by the term "final settlement," used in the statute. There is no question but that the contract was completed more than six months before the commencement of the original action. But the defendants contend that the final settlement was not made until the check for $3,999.01 was

issued on September 11, 1912 (Record, page 41). And that the action having been commenced on the 6th day of March, 1913, was commenced within six months from such final settlement. So that the question is as to whether the term "final settlement" means payment or a casting up of accounts, an adjustment and agreement between the parties or a determination by the government as to the amount due. Settlement may mean, and is sometimes used to mean, payment; but we respectfully submit that it is a much broader term; it does not necessarily mean payment, but in its generally accepted meaning, is an adjustment or agreement between the parties as the conclusion of matters between them. If the statute was used in the sense of payment, and if it had been so intended, the word "payment" would have been used instead of settlement.

The question has not been presented directly to this Court, although it has been before other Courts, and the Circuit Court of Appeals for the Second Circuit had the question before it and rendered a decision similar to that rendered in the case at bar at about the same time that this case was decided. And while neither Court seems to have had its attention called to the case pending in the other, both reached similar conclusions by unanimous decisions.

In the case of *U. S.* v. *Robinson,* 214 Fed., 38, 130 C. C. A., 434-5, the Court had before it this question in a case where the Supervising Architect of the Treasury made a report July 1st, 1908, recommending final settlement after making certain deductions for overtime damages, just as in our case, and this was approved in writing by the Secretary of the Treasury on February 10, 1909. The Court held that a suit begun after the expiration of six months and within one year from said date of February 10, 1909, was instituted within the proper time and the Court uses this language:

> In determining the time when materialmen may begin suit it would not do to fix it at some day "after complete performance" merely. Defective work, damages for delay, and other matters might give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to "complete performance of the contract and *final settlement thereof.*" We take it that these italicized words refer to the *time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is,* without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way.

Six months after date, materialmen may begin suit. This construction protects the government against the defect of the old act, viz., that its suit to recover might prove barren, because the money is gone. We can see no reason why Congress should have provided that, when the government claims nothing from contractor or sureties, all others must wait still further until some claim of the contractor against the government for having underpaid him reaches a conclusion. Such suit can in noway affect the fund provided by the bond out of which the government might have satisfied its claim, if it had any. In other words, we see no reason for holding that the final settlement must be mutual, in cases where the government makes no claim against the contractor. * * *

What it had in mind was *such a determination as to its rights,* by the proper government officers, as might fairly be taken by all persons interested as an authoritative anouncement that the government was not a claimant to any part of the proceeds of the bond. When such a determination has been made and six months have elapsed thereafter, then the others interested in the fund may bring their suit.

In the case of *Stitzer* v. *U. S.*, 182 Fed., 208, 105 C. C. A., 55-6, the Court construes the final settlement as the time when the amount due on the contract is no longer in dispute.

In the case of *U. S.* v. *Winkler,* 162 Fed., 401, arising under this statute, the Court, speaking through District Judge Ray, of New York, gives this definition to these words:

> The statute quoted seems to contemplate that in all cases the United States having entered on the work and made a contract for its execution will see that the work is completed; that, when the United States is compelled to complete the work by reason of the failure of the contractor for any reason so to do, this is "the complete performance of said contract." It also seems to contemplate that, when the work is completed by the United States, THE COST OF DOING THE WORK WILL BE ASCERTAINED, THE AMOUNT PAID THE CONTRACTOR ASCERTAINED, etc., and the amount of damages sustained by the United States ascertained, whereupon the United States may or may not sue the surety on the bond. The statute contemplates that this will be done in every case. THIS IS WHAT IS MEANT by the words "complete performance of the contract," and by the words "FINAL SETTLEMENT THEREOF."

And in the recent case of the *U. S.* v. *Bailey*, 207 Fed., 783-4, District Judge Bourquin passes on this very point:

> "Performance" and "final settlement" are not synonyms. The first is the agreed work done; THE SECOND IS THE ASCERTAINMENT OR ADJUSTMENT OF THE BALANCE OF RIGHTS AND LIABILITIES ARISING THEREFROM—IN THIS CASE, DETERMINATION BY THE UNITED STATES OF THE BALANCE DUE THE CONTRACTORS. THIS LATTER WAS NOT ACCOMPLISHED UNTIL THE CONTRACTOR'S ACCOUNTS WERE SETTLED AND CERTIFIED BY THE AUDITOR AFORESAID. When the contract was entered into the law was (it is part of the contract), and now is, that all claims, demands, and accounts wherein the United States is concerned shall be *settled and adjusted* in the Treasury Department. Section 236, Rev. St. (U. S. Comp. St. 1901, p. 130). To that end, the Third Auditor of said department is designated as Auditor for the Interior Department, to receive, examine, settle and certify all accounts relating to the department last mentioned, that Treasury warrants may issue for amounts or balances due claimants. Act July 31, 1894, c. 174, 28 Stat., 205-207 (U. S. Comp. St. 1901, pp. 148, 149).
>
> When this is done, and not until then, in respect to government contract performed, there is final settlement thereof, THOUGH FURTHER TIME BE NECESSARY FOR MERE MINISTERIAL ACTS, TO ISSUE AND DELIVER WARRANTS. In no other wise can there be final settlement of contract obligations of the United States, and this is the final settlement contemplated by the Act, February 24, 1905, aforesaid. And from *the date of said Auditor's settlement and certificate forthwith as the evidence thereof, the limited time within which actions like unto this must be commenced, begins to run.*

A similar construction is given to the same clause by the District Court of Massachusetts in *U. S.* v. *Mass. B'd & Ins. Co.*, 215 Fed., 243-4.

GENERAL DEFINITION OF FINAL SETTLEMENT. We respectfully submit that this interpretation accords with the general definition and understanding of the words "final settlement." Bouvier thus defines it:

"An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other; payment in full."

And Century Dictionary:

"The act or process of determining or deciding; the removal or reconciliation of differences or doubts; the liquidation of a claim; adjustment; arrangement; as the settlement of a controversy; the settlement of a debt."

And the Supreme Court of Wisconsin, in *Rose* v. *Bradley,* 91 Wisc., 619:

"The learned Circuit Judge said to the jury 'a settlement is the looking over of the mutual accounts of two or more persons who have had mutual business transactions and striking a balance between them.' We apprehend that the word 'striking' was used in the sense of 'agreeing upon,' and it was probably so understood by the jury; and as so understood is free from criticism, though, as given, it was not strictly correct."

And the Supreme Court of Alabama, in *Sims* v. *Waters,* 65 Ala., 442:

"A partial settlement, when founded on regular proceedings, is only *prima facie* evidence of its own correctness, throwing a laboring oar onto the hands of the party impeaching it. A final settlement is, as its terms import, a conclusive determination of all the past administration, the unimpeachable evidence of its own verity, if founded on regular proceedings, in the absence of fraud."

It is thus defined by the Court of Oregon, in *Phipps* v. *Willis,* 96 Pac., 866:

"The word 'settle' has an established legal meaning, and implies a mutual adjustment of accounts between different parties, and an agreement upon the balance."

And in *Toombs* v. *Stockwell,* 131 Mich., 633, this definition is given:

"The term settled does not necessarily mean payment. One lexicographer defines 'settle' to mean 'to adjust differences, claims or accounts, come to an agreement' (Cent. Dict. & Ency.). Another says: '*Settle' implies the* mutual adjustment of accounts, and an agreement upon the balance. The conversation therefor, between the parties was, therefore, competent in order to explain what was meant by the term."

See to the same effect, also:

Anzerias v. *Naglee,* 74 Cal., 60.
Greene County v. *Light,* 74 Ark., 41.
Miller v. *Ins. Co.,* 113 Iowa, 211.
Jackson v. *Ely,* 57 Ohio St., 450.
Pomeroy v. *Mills,* 37 N. J. Eq., 578.
Albers v. *Merchts. Ex.,* 140 No. App., 446.
Roberts v. *Spencer,* 112 Ind., 85.
Vol. 5, Words & Phrases, 6446-47, and cases.

DEPARTMENT CONSTRUCTION. Sec. 236 of the Rev. Statutes provides:

> All claims whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be **settled and adjusted** in the Department of the Treasurer.

It is clear that this statute used the word "settlement" in the form of adjusting and ascertaining.

7 Fed. Stat. Ann., 362-3, and cases.
U. S. v. *Bailey,* 207 Fed., 783-4.

It is thus made the duty of the department to make this settlement, and the settlement made by the department and its rulings and constructions of the statutes are entitled to and are given great weight by the Courts.

U. S. v. *Cerecedo Hermanos Y. Co.,* 209 U. S., 339, 52 L. Ed., 822.
Jacobs v. *Prichard,* 223 U. S., 214, 56 L. Ed., 409.
U. S. v. *Hammers,* 221 U. S., 225-6, 55 L. Ed., 714.

The language of the Court in the first case cited above is:

> We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution.

The department, which, so far as this case is concerned, is an entirely disinterested person, has made a rule upon this point and has given a construction to the term "final settlement," which, if the terms were doubtful, we respectfully submit, would be entitled to great weight in determining this doubt. This ruling has been issued by the department (Record, pp. 44-5) in a circular in reference to these very matters, and is as follows:

FINAL SETTLEMENT.

The department treats as the date of final settlement mentioned in said Acts the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly. (So far as known, the correctness of this view as to the true date of final settlement has not been decided by the Courts.)

FINDINGS OF FACT BY THE COURT. The parties, plaintiff, intervenors and defendants, by a written stipulation duly signed, waived a jury trial and the case was heard by the Judge (Record, page 30); and he made and filed his findings of fact and conclusions of law as set forth in the Record, pages 47-51. And his finding upon this question, page 49, of the Record, is: "In the present case I find as a conclusion of fact that final adjustment and settlement in the meaning contemplated by the statute was had on the 26th of August, 1912, and that the present action, therefore, was not brought before the expiration of six months from the date of final settlement."

The Court also found, at page 48 of the Record, that the action was commenced on March 6, 1913.

The Revised Statutes, Sections 649 and 700, provides for such waiver of jury trials. Under these provisions the finding of the Court has the same effect as the verdict of the jury.

It is true that these provisions apply to the Circuit Court, and prior to the enactment of the Judicial Code of 1912, the effect of such a finding by a District Judge was the same as a consent arbitration and not reviewable.

Campbell v. *Boyreau*, 62 U. S., 223, 226, 16 L. Ed., 96.
Campbell v. *U. S.*, 224 U. S., 105, 56 L. Ed., 686.

The Judicial Code, Sec. 297, does not repeal either Section 649 or 700 of the Revised Statutes, and, on the contrary, Section 291 of this Code, provides that all the powers conferred by law upon the Circuit Courts at the time of the Act, shall be deemed to refer to and confer such powers upon the District Courts.

These findings of the District Judge, so far as they are findings of fact, are conclusive and final.

U. S. v. *U. S. Fid. & Guaranty Co.*, 236 U. S., 512, 59 L. Ed.
Nashville Interurban Ry. v. *Barnum*, 212 Fed., 634, 129 C. C. A., 173-4.

SPECIFICATION II.

ASSIGNMENTS OF ERRORS 6, 7, AND 9.

LIMITATIONS—AMENDMENT.

As shown in the statement above, it will be seen from the Record that the plaintiff in error, defendant below, after the expiration of more than a year from the completion of the work and the final settlement, to wit, on September 22, 1913, Record, page 12, and after the case had been set down for trial by the Court under an express stipulation from this same plaintiff in error, moved to dismiss the action for want of essential allegations in the pleadings.

Upon the hearing of this motion, the District Judge, on October 4th, 1913, sustained it, but authorized the defendants in error, plaintiff and intervenors below, to amend their pleadings by inserting allegations showing that more than six months had elapsed from the completion and final settlement of the contract and that the United States itself had not brought a suit, and that the suit was brought within one year (Record, pages 14-16). This ruling of his Honor constitutes the basis of all or part of the sixth, seventh and ninth assignments of error. The contention of the plaintiff in error, being that the Court was without power to allow such amendment.

Conceding that under the decisions of this Court in *Baker Contr. Co.* v. *U. S.*, 204 Fed., 390, 122 C. C. A., 567, and *Stitzer* v. *U. S.*, 182 Fed., 513, 105 C. C. A., 54; *U. S.* v. *McCord*, 233 U. S., 162, 58 L. Ed., 897; *U. S.* v. *Schurman* (District Ct., Idaho), 218 Fed., 917, the limitations and conditions prescribed in the statute are conditions necessary to the plaintiffs' and intervenors' rights to recover; and that if the facts as developed in the case do not bring the parties within the limitations and conditions prescribed in the Act, it is fatal. Yet, whether the omission to allege these facts and conditions is of such nature that it cannot be cured by amendment is an entirely different question.

(a) SPIRIT AND INTERPRETATION OF ACT. It is the settled policy of the Court, as announced through the highest tribunal of the land, that this Act shall receive a liberal construction so as to advance its purpose.

Hill v. *Am. Surety Co.*, 200 U. S., 203, 50 L. Ed., 440.
Monkin v. *U. S.*, 215 U. S., 539, 54 L. Ed., 317.
Title Guaranty Co. v. *Crane*, 219 U. S., 33-4, 55 L. Ed., 77.
U. S. v. *N. Y. Steam Ftg. Co.*, 235 U. S., 327, 59 L. Ed.
Title Guaranty & Tr. Co. v. *Eng. Works*, 89 C. C. A., 624-6, 163 Fed., 168.

Equitable Surety Co. v. *U. S.*, 234 U. S., 455-6, 58 L. Ed., 1397.

The language of the Court in the Hill case above is:

> The Courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of the building to be owned and enjoyed by those who profit by the contribution of such labor or materials.

And again:

> Statutes are not to be so literally construed as to defeat the purpose of the Legislature. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." *United States* v. *Freeman*, 3 How., 556, 11 L. Ed., 724. "The spirit as well as the letter of the statute must be respected, and where the whole context of the law demonstrates a particular intent in the Legislature to effect a certain object, some degree of implication may be called in to aid that intent."

(b) RIGHT TO AMENDMENT. The amendment which the plaintiffs and intervenors asked to make, and which the Court permitted, was an amendment in the interest of truth; to make the pleadings set out more fully the actual facts upon which the action was based. It would seem to the writer that at this day no Court could refuse a request of this nature. But we respectfully submit that it is in accordance with the letter and spirit of the statute, Sec. 954, Rev. Statutes, and the judicial interpretation thereof. This statute is:

> No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any Court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such Court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such Court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

The statute is a beneficent one intended to promote justice and is to be and is liberally construed.

McDonald v. *State of Neb.*, 41 C. C. A., 284, 101 Fed., 171.
4 Fed. Stat. Ann., 597, and cases.
Vol. II, Sup. Fed. Stat. Ann., 1443-4.
T. & P. R. Co. v. *Cox*, 145 U. S., 593, 36 L. Ed., 831, 833.
M. K. & T. R. Co. v. *Wulf*, 226 U S., 576, 57 L. Ed., 363.
A. & P. R. Co. v. *Laird*, 156 U. S., 401, 41 L. Ed., 488.

The language of Justice Caldwell, in the McDonald case, on this point, is:

> This Act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had heretofore been interposed to obstruct the administration of justice as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the Federal Courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the Supreme Court of the United States grasped the object and purpose of this enactment. In referring to this section of the Judiciary Act, the Supreme Court of the United States, speaking by Mr. Justice Story, says:
>
> "The authority to allow such amendments is very broadly given to the Courts of the United States by the thirty-second section of the Judiciary Act of 1789, c. 20 (now Section 954, Rev. St., U. S.), and quite as broadly, to say the least, as it is possessed by any other Courts in England or America, and it is upheld upon the principles of the soundest protective policy." *Matheson's Adm'rs* v. *Grant's Adm'rs*, 2 How., 263, 281, 11 L. Ed., 261.

And Mr. Justice Miller is quoted in the same case, thus:

> "This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the Federal Courts, than any of the modern Codes. It is founded on common sense and justice, and ought to be regarded by the Circuit Courts as mandatory."

This was a case in which an action was brought by the Treasurer of the State, and a demurrer was sustained upon the ground that the action should have been brought in the name of the State, but an amendment was allowed substituting the same.

In the case of *M. K. & T. R. Co.* v. *Wulf*, action was brought by a parent in her individual capacity to recover damages for the death of an unmarried child, caused by an interstate railway carrier; such action could not be maintained under the Employers' Liability Act; but it was absolutely essential that the action be brought by the personal representative. An amendment was permitted allowing the administrator to maintain the action, although the two years statute of limitation had expired before the amendment. The Court, speaking through Mr. Justice Pitney, says:

> The amendment was clearly within Section 954, Rev. Stat., U. S. Comp. Stat. 1901, p. 696.
>
> Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather than in substance (*Stewart* v. *Baltimore & O. R. Co.*, 168 U. S., 445, 42 L. Ed., 537, 18 Sup. Ct. Rep., 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and, therefore, it related back to the beginning of the suit.

(c) LAW OF THE UNITED STATES governs and not the law or rules of the particular State.

Mexican Cent. Ry. Co. v. *Duthie*, 189 U. S., 78, 47 L. Ed., 719.
Van Doren v. *Penn. Ry. Co.*, 35 C. C. A., 290, 93 Fed., 260, and cases.
Manitowoc Matting Co. v. *Feuchtwanger*, 169 Fed., 983.

The language of the Court in the Van Doren case is:

> Circuit Courts, subject to the requirement of such general conformity, may in any manner not inconsistent with any law of the United States or with any rule lawfully prescribed by the Supreme Court "regulate their own practice as may be necessary or convenient for the advancement of justice," and permit parties to "amend any defect in the process or pleadings, upon such conditions," as they shall, in their discretion and by their rules, prescribe. The Circuit Courts are not bound to conform to state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants. Nor where such results would follow are their powers with respect to practice or pleading directly or indirectly limited or affected by any judicial interpretation by a State Court of a State statute relating to such matters.

(d) DISCRETIONARY—NOT REVIEWABLE. "The statute invests the Courts of the United States with large discretion in permitting the correction of defects in pleadings and process by amendment, and rulings of this character constitute no ground for reversal unless the discretion is grossly abused."

Gr. Northern Ry. Co. v. *Herron*, 68 C. C. A., 601, 136 Fed., 49.
Mexican Cent. Ry. Co. v. *Duthie*, 189 U. S., 78, 47 L. Ed., 716.

AMENDMENT TO SHOW JURISDICTION. "Where failure of pleadings to show jurisdiction is raised in the trial Court, it should permit amendment for the purpose of remedying the defect. Where the Supreme Court has reversed and remanded the cause for failure of record to show jurisdiction in the lower Court, the latter may permit amendment to show that jurisdiction really existed when suit was brought, if the facts warrant it. Or the Supreme Court in its mandate may direct that amendment be permitted."

Rose's Code of Fed. Procedure, Vol. I, Sec. 9h, p. 65.
Howard v. *DeCardova*, 177 U. S., 614, 44 L. Ed., 910.
King Bridge Co. v. *Otoe Co.*, 120 U. S., 227, 30 L. Ed., 624.
Springstead v. *Bank*, 231 U. S., 542, 58 L. Ed., 356.
Menard v. *Goggan*, 121 U. S., 253, 30 L. Ed., 914.
Metcalf v. *Watertown*, 128 U. S., 590, 32 L. Ed., 544.
Campbell v. *Johnson*, 92 C. C. A., 566, 167 Fed., 102.

It is further to be noted upon this question of amendment that the intervention petitions which were a part of the record in the case, clearly alleged and pointed out the date of final settlement and that date as being more than six months prior to the commencement of the action. The Court had this before it on the motion, and we respectfully submit that we are entitled to rely upon it in sustaining the complaint.

RULE. We respectfully submit that the rule to be drawn from all our authorities is that where a right of action existed at the time the action was commenced by the parties, and the jurisdictional facts actually existed, no party will be turned out of Court because of his failure to allege them; he will be permitted to amend his pleadings in accordance with the facts and the truth of the case.

The application of this principle will reconcile the cases in which the amendments have been allowed, cited above, with those where they have been disallowed. In the latter class, we find the case of *U. S.* v. *McCord*, 233 U. S., page 157, 163-4, where the action was brought before the expiration of six months, a fact which was held to be a condition precedent to the right to maintain it, and the Court held that an amendment, after the expiration of the twelve months,

could not save the action; for the rights which were necessary as a basis for the action, did not exist at the time of the commencement of the action, as they did in our case, and in the cases where the amendment has been allowed.

(e) AMENDMENT RELATES BACK. Whether we consider the conditions prescribed by the statute in the nature of a statute of limitation or as an essential condition to the success of plaintiff's right, any amendment relates to the commencement of the action, and the limitation of six months and one year, respectively, runs to the original commencement of the action and not to the date of the amendment. See cases cited above under (b) and (d). Also:

Patillo v. *Allen West Com. Co.*, 65 C. C. A., 519, 131 Fed., 680, and cases.

Armstrong, Cook & Co. v. *Merchants Refining Co.*, 107 C. C. A., 99, 184 Fed., 199.

McDonald v. *State of Neb.*, 41 C. C. A., 287-8, 101 Fed., 171.

Van Doren v. *Ry.*, 35 C. C. A., 293, 93 Fed., 271, and cases.

The doctrine announced by the Court in the McDonald case is thus set forth:

> The doctrine in this case is reaffirmed by the same Court in *Sanger* v. *Newton*, 134 Mass., 308, where it is said:
> "The fact that the three years within which an original petition could have been filed have elapsed furnished no ground for refusing the amendment. But rather a reason why it should be allowed, as otherwise substantial justice will be defeated."

In *Van Doren* v. *Railroad Co.*, the suit was brought in the name of Laura L. Van Doren, as administratrix of her deceased husband, and subsequently, and after the statute of limitations had run against a suit in her name as a widow, she applied to the Court for leave to amend the declaration by declaring as widow, instead of administratrix, of her deceased husband. The lower Court refused to allow the amendment, but this ruling was reversed by the Circuit Court of Appeals, that Court saying:

> "Substantial justice requires that such an amendment should be allowed as a second suit for damages for the death of Henry Van Doren would be barred by the one-year limitation in the Pennsylvania statute."

The language of the Court, by Judge Sanborn, in the Patillo case is:

> The rule of law upon this subject is that "an amendment to a petition which sets up no new cause of action or claim and

> makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point."

In practically all of the cases last cited above, and in most of those from the United States Supreme Court cited above under (b), the question of the bar of the statute of limitations arose under the contention that the statute ran until the date of the amendment, but the Court has uniformly overruled this contention in all the cases. This point was made in *T. & P. Ry. Co.* v. *Cox,* and in *M. K. & T. R. Co.* v. *Wulf,* and overruled.

DECISIONS ON THIS STATUTE. The only case which we can find throwing any light upon an amendment in reference to allegations required by this particular statute, are the cases of *Title Guaranty & Trust Co.* v. *Eng. Works,* 163 Fed. 168, 89 C. C. A., 628, and *Title Guaranty & Trust Co.* v. *Crane,* 219 U. S., 34, 55 L. Ed., 77. The language of the Court in the first case (affirmed in the second) is:

> It is said that application by affidavit to the department under whose direction the work of constructing the vessel was performed was a condition precedent to bringing the suit. The amended statute contemplates that the person who may wish to bring a suit shall file an affidavit of his claim with the department having charge of the work for which bond has been given, and obtain a certified copy of the contract and bond upon which right of action is given. The object of this requirement is to protect the department of the government which may be concerned from being required to give information upon any simple request as to the nature of the contract and bond under which the contractor may be performing his contract, and also to show good faith and interest in the subject matter. But we do not think that JURISDICTION IS LACKING, UNLESS SUCH AN AFFIDAVIT HAS BEEN FILED.

(f) RIGHTS OF INTERVENORS INDEPENDENT. While we most respectfully insist that the foregoing construction is the proper construction to give this statute in reference to the words "final settlement," and that the original complainants' suit was not prematurely filed, still, if the Court should hold that the statute should be given the construction contended for by the defendant, we submit that the intervention of E. J. Ehrbelding is in nowise jeopar-

dized and he is entitled to proceed to judgment in the name of the United States for his use.

Each claimant in the action on a contractor's bond given under this statute, has a distinct cause of action. *United States* v. *Mass. Bonding Co.*, 198 Fed., 927; *Title Guaranty Co.* v. *Crane*, 219 U. S., 24; *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed., 168.

Suppose a materialman or subcontractor should file a suit thirty days after completion and final settlement of a public contract, which on its face sets out a cause of action alleging every material allegation required under this statute, after a delay, we will say of six months from the date of filing, other materialmen and subcontractors are then notified of the pendancy of this suit, what should they do? Could they ignore this suit and treat it as null and void? Suppose they did know, that as a matter of fact when it came down to a question of proof, the plaintiff could not prove an essential element of his case, to wit, that he had not waited six months from the final settlement before filing his suit, what should they do? Must they ignore the original suit in face of the specific provision that one suit only can be brought under this statute? Then, again, suppose a materialman or subcontractor knew that the original complainant, when it came down to a question of proof, could not show that he had furnished a dollar's worth of the material he was suing for, yet the suit on its face made a complete case, could he ignore the pendency of such suit and refuse to intervene therein?

We do not think the last question can be answered otherwise than in the nagative. If so, the failure to prove that the suit was not filed in time can have no more effect on the rights of the intervenor, Ehrbelding, than failure of the original complainant to prove any other essential fact in his case.

It has been held that the dismissal by a plaintiff of his cause of action, or a nonsuit as to the plaintiff, does not prevent an intervenor from having his rights adjudicated. 17 Enc. of Law (2 ed.), 185, 11 Enc. of Pleading and Practice, 509.

The Court in the case of *Poehlmann* v. *Kennedy*, 48 Cal., 207-8, in passing upon the effect of a nonsuit of a plaintiff on the questions raised by the intervention, the lower Court, having dismissed the intervention after nonsuiting the plaintiff, uses this pertinent language:

> But we think the Court erred in dismissing the intervention upon the ground that there was no action pending after the nonsuit had been granted. The intervenor was a party to the suit, claiming an interest in the matter in litigation adverse to

both plaintiff and defendant. As such party he was entitled to have the issues raised between himself and each of them tried and determined. The right could not be effected by the dismissal of the plaintiff's action.

We submit the rights of intervenors in this case are in nowise effected under this statute by a nonsuit of plaintiff. They certainly are adverse to the defendant and are in nowise beneficial to the original complainant.

The contention of counsel for defendant that the intervention of E. J. Ehrbelding has never been allowed by the Court, we submit is not tenable. The statute does not require any order of Court making an intervenor a party plaintiff. On the contrary, it is compulsory that every subcontractor and materialman make himself a party by coming in and setting up his claim, and if he fails to do so, he is forever barred. But if we are wrong in this position the defendant has waived any rights it may have had along this line by accepting service of the intervention and pleading to the merits (Record, p. 11). Even though the Court should hold that the original suit was void, we submit the intervention is good as an original suit against the defendants. We allege everything required under the statute to make a perfect case; it was filed after the expiration of six months from the final completion and settlement between Stannard and the United States of the original contract and within twelve months therefrom; the defendants acknowledged service thereof and filed defenses thereto, all of which was done after the expiration of the inhibited six months and within twelve months from the completion and final settlement. What other steps could we have taken if we had started out to file a separate suit, than the ones above enumerated?

The case of *U. S.* v. *McCord*, 233 U. S., 157, 164, does not conflict with this position because in that case, as the Court states, "Nor do we think that the intervention can be treated as an original suit. No service was made or attempted to be had upon it as required by the statute, when original actions are begun by creditors."

In our case, the petitions of intervenors were served upon the parties, defendants, now plaintiff in error, and they appeared and answered each of these intervention petitions taking issue on the merits thereof (Record, page 11).

SPECIFICATION III.

ASSIGNMENT OF ERROR 8.

SUBSTITUTED PARTY.

The 8th assignment of error is to the right of the Court to render judgment in favor of Carolina Electrical Company on the ground that it was not a party to the action. An examination of the record will show that the nominal party to the record was Electrical Engineering and Contracting Company, as assignee of the receiver of Carolina Electrical Company.

EVIDENCE. We take it that this assignment of error is based upon the idea that the Court was in error in admitting in evidence the certified copies of the charter and amendment thereto, set out at pages 31-8 of the Record, and certified copies of the Record of the order of the Superior Court of Wake county, North Carolina, in the case in which the receiver was appointed (Record, pages 45-6).

The ruling of his Honor in admitting in evidence the copy of the charter certified by the Secretary of State was based upon Section 906 of the Revised Statute (which is different from Section 905, which latter is applicable to judicial records). It provides for the admission in evidence of records from any public officer of the State, "by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal * * * or if given by such Governor, Secretary (of State), Chancellor, or keeper of the great seal, it shall be under the great seal of the State, territory or county in which it is made. And the said records and exemplifications so authenticated, shall have such faith and credit given to them in every Court and office within the United States as they have by law or usage in the Courts or offices of the State, territory or county, as aforesaid, from which they are taken."

3 Fed. Stat. Ann., p. 40.

Under the statutory law of North Carolina, which was offered in evidence in this case, it is provided by Section 1139 of the Revisal of 1905 how certificates of incorporation shall be signed and filed in the office of the Secretary of State, and recorded there, as also in the county in which the corporation has its place of business, "and said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State or by the Clerk of the Superior Court of the county in which the same is recorded, shall be evidence in all Courts and places, and shall, in all judicial proceedings, be deemed *prima faice* evidence of the complete organization and incorporation of the company purporting thereby to have been established."

The copies of the records from the Superior Court of Wake county were certified by the Clerk and then by the presiding Judge, and again by the Clerk in exact accordance with Section 905 of Revised Statutes. Although not so shown in Record, p. 46, counsel admit certificates were proper. We do not see how this objection can be seriously pressed in view of the plain language of the statute.

The Court, however, held that the order appointing the receiver would not vest him with authority to assign and transfer a claim of Carolina Electrical Company to Electrical Engineering and Contr. Co., and for this reason declined to render the judgment in favor of the assignee (Record, page 51), but rendered judgment in favor of the original creditor, leaving it open to the assignee to furnish further evidence of its right to collect the judgment.

RIGHT TO SUBSTITUTE PARTY. Under authority of Section 954 of the Revised Statute, as well as the authorities cited above, the Court had a right, and it was its duty to render judgment in favor of the real party in interest without regard to matter of form, and to make such one a real party to the action.

M. K. & P. R. Co. v. *Wulf, supra.*
McDonald v. *State of Neb., supra.*

The Court, in the McDonald case above, through Mr. Circuit Judge Caldwell, says:

> But it has come to be the settled law that where, either by **mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake;** but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, **when the effect would be to let in the bar of the statute of limitations.**

SPECIFICATION IV.

ASSIGNMENT OF ERROR 10.

ACTION AT LAW OR EQUITY.

The tenth assignment of error raises the question as to whether the proceeding under this statute is an action at law or a suit in equity; a point raised by the motion of defendants on the 22d of September, 1913 (Record, page 12).

QUESTION RAISED TOO LATE. It will be observed that the plaintiff in error, defendant now, on the 5th day of April, 1913 (Record, pages 7-8), had entered into a stipulation after the answer to the merits, setting the cause for trial on Calendar 1, for trial of issues of fact raised by said answers. Calendar 1, under the practice of the Federal Court, following the practice of the State Court, is for issues of law and fact, to be tried by a jury in law cases. An objection to the proper jurisdiction of the Court should be made on the threshold of the case, and is too late after answer on merits, and the case set down for trial.

Sloss I. & S. Co. v. *S. C. & G. R. Co.*, 162 Fed., 546.
Acord v. *West Pocahontas Corp.*, 156 Fed., 1001.
Affirmed by Court of Appeals, 174 Fed., 1019, 98 C. C. A., 637.
And *certiorari* denied by this Court in 215 U. S., 607, 54 L. Ed., 346.
Farrington v. *Pittsburg*, 114 U. S., 143, 29 L. Ed., 114.
Brown v. *Lake Superior I. Co.*, 134 U. S., 534, 33 L. Ed., 1024.
Peale v. *Marian Cole Co.*, 190 Fed., 389 (D. C., Penn.).
T. & P. Ry. Co. v. *Cox*, 145 U. S., 603, 36 L. Ed., 832.
Eldorado Coal & Min. Co. v. *Mariotti*, 215 Fed., 54, 131 C. C. A., 362.

UNIFORM PRACTICE. An examination of the cases which have arisen under this statute, both in the Circuit Court of Appeals and in this Court, will show that with practical unanimity, outside of the cases noted below, the cases have come to the appellate Courts on writ of error, and while the question was not raised, they were treated as actions at law.

U. S. v. *Congress Const. Co.*, 222 U. S., 199, 56 L. Ed., 163.
U. S. v. *Boomer*, 183 Fed., 726, 106 C. C. A., 164 (8th Circuit).
Stitzer v. *U. S.*, 182 Fed., 513, 105 C. C. A., 51 (3d Circuit).
Baker Contr. Co. v. *U. S.*, 204 Fed., 390, 122 C. C. A., 561 (4th Circuit).

Eberhart v. *U. S.*, 204 Fed., 884, 123 C. C. A., 181 (8th Circuit).
U. S. Fidelity Co. v. *U. S.*, 209 U. S., 306, 52 L. Ed., 437.
Hill v. *Amr. Surety Co.*, 200 U. S., 197, 50 L. Ed., 437.
Mankin v. *Ludowici-Celadon Co.*, 215 U. S., 533, 538, 54 L. Ed., 315.
U. S. v. *Freel*, 186 U. S., 309, 312, 46 L. Ed., 1177.
U. S. Fid. & Guaranty Co. v. *U. S.*, 194 Fed., 611, 116 C. C. A., 187 (9th Circuit).
U. S. Fid. & Guaranty Co. v. *U. S.*, 204 U. S., 349, 51 L. Ed., 516.
Davidson Bros. etc. v. *U. S.*, 213 U. S., 10, 53 L. Ed., 675.
U. S. v. *N. Y. Steam Fitting Co. et al.*, 235 U. S., 327, 59 L. Ed.
U. S. v. *McCord*, 233 U. S., 157, 58 L. Ed., 893; Laine case, 218 Fed., 991, 133 C. C. A., 674.
U. S. v. *Robinson.*
U. S. v. *U. S. F. & Guaranty Co.*, 236 U. S., 512.

The Circuit Court of Appeals for the Second Circuit, in the case of *Illinois Surety Co.* v. *U. S.*, 212 Fed., 136, 129 C. C. A., 587, has held that it was a suit in equity.

In the case of *U. S.* v. *Stannard*, 207 Fed., 202-3, Judge Ray, of the District Court, in the same Circuit, held that it was an action at law, using this language:

> Is the action authorized by these statutes one at law or one at equity? Clearly, it is an action at law. It is an action on a contract and a bond, the contract made between Stannard and the United States, and the bond made between Stannard as principal and the Illinois Surety Company as his surety, as first parties, and the United States and all persons supplying Stannard with labor and materials in the prosecution of the work referred to in such contract and bond, as parties of the second part, or possibly we may better say between said principal and surety of the one part, and the United States of the second part, and for the benefit of such persons furnishing labor and materials. * * * The fact that all subcontractors having unpaid claims may come in and prove their contracts and claims, and establish the amount due them, and share *pro rata* in the judgment or recovery, does not make the case equitable in its nature, or deprive either party of his or its right to a trial by jury of all issuable facts.

The case of *Title Guaranty & Trust Company* v. *Crane Co.*, 219 U. S., 34, 55 L. Ed., 77, being the same case reported in 89 C. C. A.,

624-6, holds that each claimant is entitled to a docket fee of $10 under the provisions of Section 824 of the Revised Statutes. A reference to this section shows that the clause upon which the decision is predicated, reads: "In cases at law, when judgment is rendered without a jury, $10."

IMMATERIAL. We respectfully submit that, as the Court has determined in the present case, the question is entirely immaterial. The case was tried by consent of counsel and under a written stipulation by the Court (Record, page 30); that is to say, just as it would have been tried if it had been a suit in equity.

Rule 21 of the District Court of the District of South Carolina, promulgated by the same presiding Judge who tried the case, provides:

> If at any time it shall appear that an action commenced at law should have been brought as a suit on the equity side of the Court, it shall be forthwith transferred to the equity side and be there proceeded with, with such alterations in the pleadings as shall be essential.

Rule 22 of the equity rules, adopted by this Court, provides a corresponding right of transfer where an action at law is begun as a suit in equity. Hence, the only actual effect of this point would have been to nominally transfer the case from one docket to the other (*Illinois Surety Co.* v. *U. S.*, *supra*), while the trial would have been just as it was.

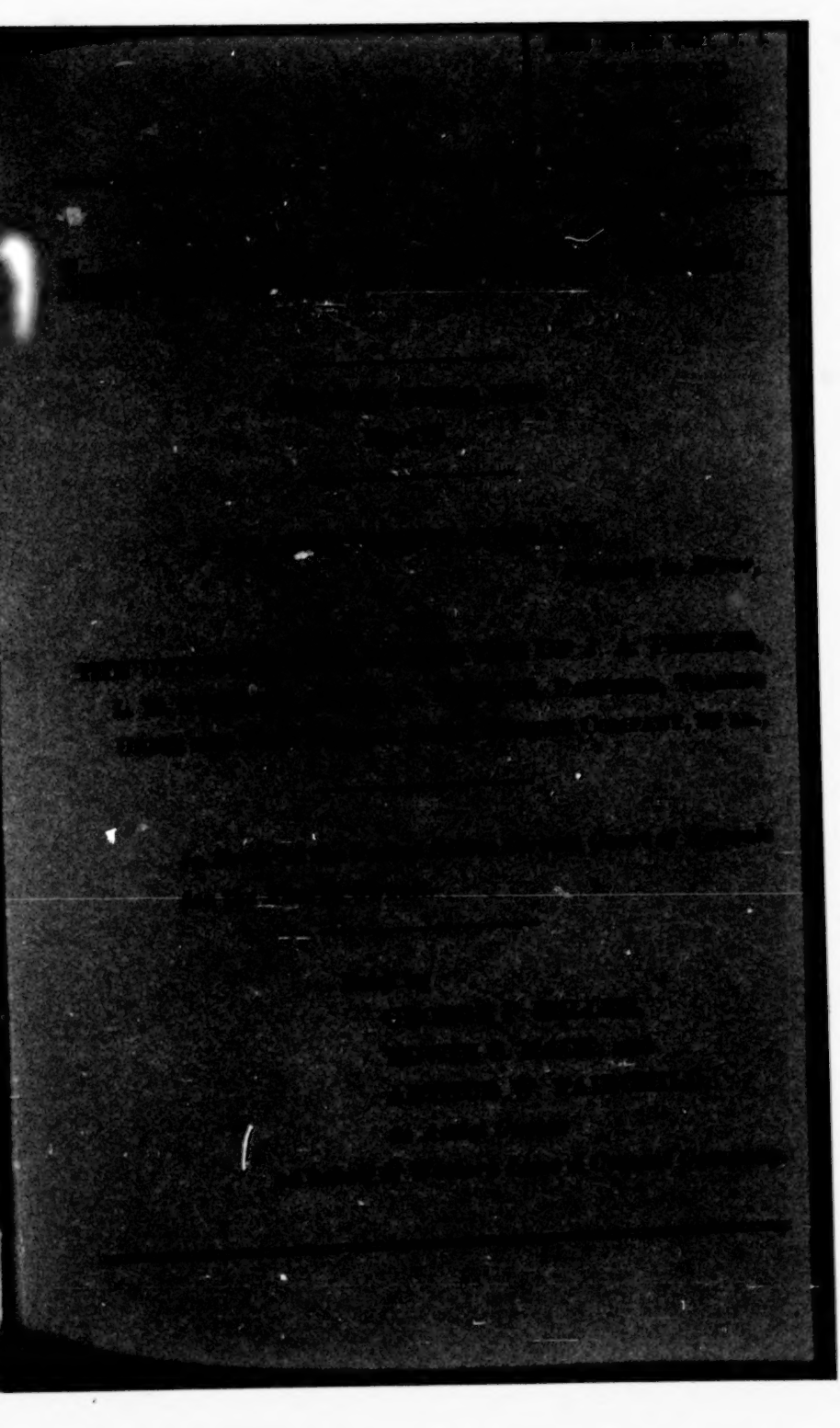
We most respectfully submit that the almost universal practice of bringing these cases as actions at law, and the silence of the Court in regard thereto, are weighty reasons for the Court to decline to give ear to that which is mere shadow when there is no substance or merit back of it.

Respectfully submitted,

PIERCE BROTHERS,
JOHN. L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Defendant in Error.

Service of this brief acknowledged this the .... day of December, A. D. 1915.

.....,
Attorney for Plaintiff in Error.



INDEX.

TABLE OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY,
Plaintiff in Error,
vs.
THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, Partners, Trading under the Firm Name of Faith Granite Company, et al.,

In error to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief by

George P. Miller, Edwin S. Mack and Arthur W. Fairchild on behalf of Western Lime & Cement Company as amici curiae.

The Western Lime & Cement Company is interested, as a sub-contractor, who furnished materials used in the construction of the ten main buildings of the Naval Training Station at North Chicago, Illinois, which buildings were constructed under a contract made on the part of the United States by the Navy Department, in a suit brought under the statute here involved. The result in that suit is practically certain to depend upon the holding of this Court as to what constitutes the final settle-

ment with reference to which the time for the commencement of suits on federal building contractors' bonds must be determined. Considerable confusion has arisen in the decisions of the various federal courts on this question, all of which, we believe, will be avoided if the question at issue be considered from all possible viewpoints rather than with reference to the particular situation presented in a single case. We, therefore, respectfully beg leave to submit these views as amici curiae.

This statute is the act of February 24, 1905, U. S. Compiled Statutes (Supp. 1907), and reads as follows:

> "*Bonds of Contractors for public buildings or works; rights of persons furnishing labor and materials; remedies on bonds, and proceedings in actions thereon.*
>
> That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall *promptly make payments to all persons supplying him or them with labor and materials* in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished *labor or materials* used *in the construction or repair* of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the

bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months *from the completion* and *final settlement* of said contract, then the person or persons supplying the contractor with *labor* and *materials* shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, *That* where *suit* is instituted by any of such creditors on the bond of the contractor it *shall not be commenced until after* the *complete performance of said contract and final settlement thereof*, and shall be commenced within one year after *the performance and final settlement of said contract*, and not later; And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and *any*

creditor may file his claim in such action *and be made party* thereto *within one year from the completion of the work under said contract, and not later.* If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to-wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability; Provided further, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor." (Italics ours.)

As we understand it, the defendant in error contends that there was a settlement on August 26, 1912, either (1) because on that day the Government received from the contractor an agreement to accept the amount proposed by the Government to be paid, or (2) because on that day the Treasury Department finally settled the account so far as the Government was concerned, the Treasury Department, in so doing, exercising its power

and authority to settle and adjust claims and demands against the United States without regard to the question as to what department may have made the contract.

On the other hand we understand that the plaintiff in error contends that there was a final settlement either on September 11, 1912, when the voucher for the sum theretofore fixed upon was issued, or on September 12, 1912, when the receipt of payment was endorsed thereon.

Before a suit may be commenced under this statute there must be both *complete performance* of the contract and *final settlement* of the contract.

United States vs. McCord, 233 U. S., 157.

United States vs. Stannard, 207 Fed., 198, 201.

United States vs. Bailey, 207 Fed., 782.

Stitzer vs. United States, 182 Fed., 513, 518.

United States vs. Mass. Bonding & Ins. Co., 215 Fed., 241.

It is true that there is a distinction between final completion of the work and final settlement under the contract.

The provision relating to completion of the work deserves especial emphasis. That provision is important not alone for the protection of the United States, but for the adequate protection of the persons for whose benefit the bond is required. Every

person who furnishes any material or labor is entitled to its benefits. This does not mean every person who furnishes materials or performs labor in the early stages of the performance of the contract. The man who may have a claim for $2.50 for the last day's work in plastering a piece of wall in order that the contract shall be complete is entitled to the benefit of the bond. So long as anything remains to be done looking toward the completion of the contract and the contractor has not been excused from the doing of that work, there is not a complete performance of the contract or of work under the contract. It undoubtedly is true that even when the work is in a sense physically incomplete there may be a final settlement arrived at by agreement in which further performance shall be waived, but to have that effect the final settlement must be one which terminates the contract. In the case at bar it appears that on August 15, 1912, all work embraced in the contract had been satisfactorily completed. As we shall see *it is of the utmost importance that "final settlement" be given such a construction that in all cases it will have been preceded by final completion.*

I.

Does it Mean Payment?

Of course, there would be a final settlement when payment was made if none had preceded it, and there is room to argue that there can be none prior to final payment.

We shall, therefore, omit any discussion of the question as to whether or not payment constitutes

final settlement, and we shall discuss first the proposition that final settlement, within the meaning of this statute, means adjustment by agreement.

II.

Does it Mean Adjustment by Agreement?

The first rule of construction is that words should be given their ordinary meanings. It is only necessary to define the word "settle". "Settlement" means an adjustment of differences by agreement. It has been said to be:

> "a determination by agreement; * * * an adjustment between persons concerning their dealings or difficulties, whereby a balance is ascertained to be due from one to the other, or an agreement is entered into which terminates their controversy; * * * payment, or accord and satisfaction, or something equivalent to accord and satisfaction, admissible as a defense under the general issue;"
>
> *35 Cyc.*, 1443.

Construction should not be resorted to until ambiguity arises. Words should be accorded their popular meaning wherever possible. Any person interested in a bond given under this statute, having this rule of construction in mind, would assume that whenever he found that the parties had *agreed* upon a settlement, the date of such agreement was the date by which he must be guided in commencing his action. The word "settlement" when relating to a bi-party arrangement of any kind should be held to refer to a bilateral settlement. If this rule of construction be followed, it must be held in this case that there was a final

settlement on the day when the contractor in writing assented to the settlement proposed to him by the Government. Until that time there was no settlement. After that time there remained nothing to be settled.

We respectfully submit as the most logical construction of the statute that indicated in the following abstract from the findings of the learned trial judge in the case at bar:

> "I construe the words 'final settlement' to mean a final adjustment and determination either by contractual agreement of the parties or by proper judicial proceedings of the final results of the operation under the contract, so as to finally determine the balance or result on whichever side it may be." (Transcript p. 49.)

While in this case the court of appeals discussed the proposition covered by the next subdivision of this brief, the real ground of the decision was that there was an adjustment by agreement, a proposition finding support in other decisions.

Illinois Surety Co. vs. United States, 215 Fed., 334; 131 C. C. A., 476.

United States vs. Illinois Surety Co., 226 Fed., 653, 662.

Stitzer vs. United States, 182 Fed., 513.

Of course, if there be any claim that the work is in any sense incomplete, there cannot be a final settlement closing up the entire controversy by an agreement between the parties except one which would involve a waiver of final completion. In that sense of the word it may be true that there can

be a *final settlement by agreement*, an element of which shall be *an agreement to treat the contract as completed, or a waiver of further completion.* These conclusions are arrived at by the application of the ordinary rules of construction.

III.

Does it Mean Merely a Statement of the Government's Position?

Let us now consider whether or not there is any reasonable theory upon which the statute may be given a construction, under which final settlement may be held to be anything other than an adjustment by agreement of the parties. We enter upon this branch of the discussion on the assumption that the statute is so worded as to require a construction and to call for a departure from the cardinal rule requiring that words be given their popular meaning. Proceeding on that assumption, to what would a person interested naturally turn as a definition of "settlement" and what would he assume to be the only definition to be adopted if the ordinary one be rejected? Most persons would be inclined to construe the words "final settlement" to mean, as did the learned trial judge.

If, however, there can be a unilateral settlement, it must be some act which, at least in some sense, results in settling the matter for that party.

If we turn to the statutes relating to claims against the Government, we will find that there is a provision under which the amount to be allowed on a claim is definitely settled and the Government committed to that settlement (at least until

it shall have been overturned by some proper judicial proceeding).

Attention is called to the following statute:

> "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."
>
> *Section 236 R. S.; 3 Stat. L. 366; 7 Fed. Stats. Ann., 362.*

A reading of the discussion of final settlement in *2 Op. Atty. Gen. 625, at pages 629 and 630;* and *13 Op. Atty. Gen. 5, at page 7,* indicates that the term "final settlement" had come to have a meaning under this section.

We also call attention to the following statute:

> "All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the auditors of the Treasury, according to the nature of the contracts; *Provided,* That this section shall not apply to the existing laws in regard to the contingent funds of Congress."
>
> *Section 3743 R. S.; 28 Stat. L. 210; 6 Fed. Stats. Ann., 131.*

Under this act, as formerly framed (July 16, 1798) it was held in *2 Op. Atty. Gen. 518 (1832)* that contracts for bricks and masonry at Fort Monroe ought to have been deposited with the Comptroller, and accounts arising therefrom ought to be adjusted at the Treasury Department, and that until that should be done, the Secretary of War could not be called upon to order payment.

We find the word "settled" used also in Section 271 R. S., which reads as follows:

> "The Comptroller of the Treasury, in any case where, in his opinion, the interests of the Government require it, shall direct any of the auditors forthwith to audit and *settle* any particular account which such auditor is authorized to audit and settle."
>
> (Italics ours.)
>
> *28 Stat. L. 206; 7 Fed. Stats. Ann., 375.*

Section 8 of the Act of July 31, 1894 (28 Stat. L. 162; 7 Fed. Stats. Ann. 384) provides that the balances which may from time to time be certified by the auditors

> "upon the *settlements* of public accounts, shall be final and conclusive upon the executive branch of the Government, except that any person whose accounts may have been *settled*, the head of the executive department * * * to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government: * * *
>
> Any person accepting payment under a *settlement* by an auditor shall be thereby precluded from obtaining a revision of such *settlement* as to any items upon which payment is accepted. * * * When suspended items are finally *settled* a revision may be had as in the case of the original *settlement*. * * *"
>
> (Italics ours.)

Section 23 of this same act *(7 Fed. Stats. Ann. 389)* provides that nothing therein shall be construed to authorize the re-examination and pay-

ment of any account "which has heretofore been disallowed or *settled.*" All through the act in question is found the word "settled" used in connection with the determination by the Treasury Department as to the disposition to be made of the various claims therein referred to.

By *Section 277 R. S.; 17 Stat. L. 287; 7 Fed. Stats. Ann. 377* various auditors of the Treasury Department are assigned to receive and examine accounts accruing in or relative to the other departments.

It is reasonable to assume that Congress intended to fix the time within which the suit might be commenced with reference to some act or date readily and easily ascertainable and fixed and certain in its nature.

If, in the statute under consideration, the words "final settlement" refer to the same thing referred to by the words "settled" and "settlement" used in reference to the settlement and adjustment of claims and demands against the United States in the Department of the Treasury, we have then pointed out to all persons interested the action for which they must be on the alert and the office in which they are to seek for the information. There is fixed, with a reasonable degree of definiteness the thing, or action, which determines the date of final settlement. It is the only reasonable construction to be given to the act if the ordinary rule is not to be followed. These views are well stated by District Judge BOURQUIN of the District of Montana in an opinion to which we beg leave to refer.

United States vs. Bailey, 207 Fed., 782.

The same views were taken by Circuit Judge DODGE in the District Court of Massachusetts on March 28, 1913.

United States vs. Massachusetts Bonding & Insurance Co., 215 Fed., 241.

While the decision of the court of appeals in the case at bar is really based upon the proposition that there was a settlement by agreement, the view is also taken that the same date would be fixed if "final settlement" were defined as above outlined.

If, then, final settlement means an authoritative statement of the Government's position as to the amount due or owing on the one side or the other, it means the settlement and adjustment of all claims by the Treasury Department acting in the exercise of its powers under Section 236 R. S. But, if any work under the contract remains uncompleted, then, in order that such action may constitute final settlement an element thereof must necessarily be an absolute termination of the contract as a matter of right, as for instance under a power to terminate for want of proper prosecution of the work.

Persons for whose benefit this statute is framed have but six months within which to commence suit. If the suit be begun a day before or a day after the period fixed it must be dismissed. Whatever be the decision reached in the case at bar, we respectfully submit that it should be based on a definite conclusion as to the meaning of the words "final settlement." Claimants under these bonds

should not be required to follow everything done in half a dozen different departments and bureaus. To say that it means the date of payment, or date of meeting of the minds of the parties on the basis of an agreed settlement evidenced in some definite manner, either of which involves settlement for both parties, or date of settlement and adjustment of the claim by the Treasury Department, which may in a sense be said to settle the matter so far as the Government is concerned, is to fix a date that may be followed with reasonable certainty. To say anything else is to leave them always in danger of the loss of a valuable right because of the conflicting views as to the information which may be material entertained by various departmental officers from whom information is sought.

Respectfully submitted,

GEORGE P. MILLER,
EDWIN S. MACK,
ARTHUR W. FAIRCHILD.